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PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

Subpart A—Regulation S-B

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ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

Subpart A—Regulation S-B

§ 228.10 (Item 10) General.

(a) *Application of Regulation S-B.* Regulation S-B is the source of disclosure requirements for “small business issuer” filings under the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”).

(1) *Definition of small business issuer.* A small business issuer is defined as a company that meets all of the following criteria:

(i) has revenues of less than \$25,000,000;

(ii) is a U.S. or Canadian issuer;

(iii) is not an investment company; and

(iv) if a majority owned subsidiary, the parent corporation is also a small business issuer.

Provided however, that an entity is not a small business issuer if it has a public float (the aggregate market value of the issuer’s outstanding voting

and non-voting common equity held by non-affiliates) of \$25,000,000 or more.

NOTE: The public float of a reporting company shall be computed by use of the price at which the stock was last sold, or the average of the bid and asked prices of such stock, on a date within 60 days prior to the end of its most recent fiscal year. The public float of a company filing an initial registration statement under the Exchange Act shall be determined as of a date within 60 days of the date the registration statement is filed. In the case of an initial public offering of securities, public float shall be computed on the basis of the number of shares outstanding prior to the offering and the estimated public offering price of the securities.

(2) *Entering and Exiting the Small Business Disclosure System.* (i) A company that meets the definition of small business issuer may use Form SB-2 for registration of its securities under the Securities Act; Form 10-SB for registration of its securities under the Exchange Act; and Forms 10-KSB and 10-QSB for its annual and quarterly reports.

(ii) For a non-reporting company entering the disclosure system for the first time either by filing a registration statement under the Securities Act on Form SB-2 or a registration statement under the Exchange Act on Form 10-SB, the determination as to whether a company is a small business issuer is made with reference to its revenues during its last fiscal year and public float as of a date within 60 days of the date the registration statement is filed. *See* Note to paragraph (a) of this Item.

(iii) Once a small business issuer becomes a reporting company it will remain a small business issuer until it exceeds the revenue limit or the public float limit at the end of two consecutive years. For example, if a company exceeds the revenue limit for two consecutive years, it will no longer be considered a small business. However, if it exceeds the revenue limit in one year and the next year exceeds the public float limit, but not the revenue limit, it will still be considered a small business. *See* Note to paragraph (a) of this Item.

(iv) A reporting company that is not a small business company must meet the definition of a small business issuer at the end of two consecutive fiscal

years before it will be considered a small business issuer for purposes of using Form SB-2, Form 10-SB, Form 10-KSB and Form 10-QSB. See Note to paragraph (a) of this Item.

(v) The determination as to the reporting category (small business issuer or other issuer) made for a non-reporting company at the time it enters the disclosure system governs all reports relating to the remainder of the fiscal year. The determination made for a reporting company at the end of its fiscal year governs all reports relating to the next fiscal year. An issuer may not change from one category to another with respect to its reports under the Exchange Act for a single fiscal year. A company may, however, choose not to use a Form SB-2 for a registration under the Securities Act.

(b) *Definitions of terms.*

(1) *Common Equity*—means the small business issuer's common stock. If the small business issuer is a limited partnership, the term refers to the equity interests in the partnership.

(2) *Public market*—no public market shall be deemed to exist unless, within the past 60 business days, both bid and asked quotations at fixed prices (excluding "bid wanted" or "offer wanted" quotations) have appeared regularly in any established quotation system on at least half of such business days. Transactions arranged without the participation of a broker or dealer functioning as such are not indicative of a "public market."

(3) *Reporting company*—means a company that is obligated to file periodic reports with the Securities and Exchange Commission under section 15(d) or 13(a) of the Exchange Act.

(4) *Small business issuer*—refers to the issuer and all of its consolidated subsidiaries.

(c) *Preparing the disclosure document.*

(1) The purpose of a disclosure document is to inform investors. Hence, information should be presented in a clear, concise and understandable fashion. Avoid unnecessary details, repetition or the use of technical language. The responses to the items of this Regulation should be brief and to the point.

(2) Small business issuers should consult the General Rules and Regulations

under the Securities Act and Exchange Act for requirements concerning the preparation and filing of documents. Small business issuers should be aware that there are special rules concerning such matters as the kind and size of paper that is allowed and how filings should be bound. These special rules are located in Regulation C of the Securities Act (17 CFR 230.400 *et seq.*) and in Regulation 12B of the Exchange Act (17 CFR 240.12b-1 *et seq.*).

(d) *Commission policy on projections.* The Commission encourages the use of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines below set forth the Commission's views on important factors to be considered in preparing and disclosing such projections. (See also 17 CFR 230.175 and 240.3b-6).

(1) *Basis for projections.* Management has the option to present in Commission filings its good faith assessment of a small business issuer's future performance. Management, however, must have a reasonable basis for such an assessment. An outside review of management's projections may furnish additional support in this regard. If management decides to include a report of such a review in a Commission filing, it should also disclose the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* Traditionally, projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss) and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible to misleading inferences through selective projection of only favorable items. It generally

would be misleading to present sales or revenue projections without one of the foregoing measures of income. The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two or three year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year.

(3) *Investor understanding.* Disclosures accompanying the projections should facilitate investor understanding of the basis for and limitations of projections. The Commission believes that investor understanding would be enhanced by disclosure of the assumptions which in management's opinion are most significant to the projections or are the key factors upon which the financial results of the enterprise depend and encourages disclosure of assumptions in a manner that will provide a framework for analysis of the projection. Management also should consider whether disclosure of the accuracy or inaccuracy of previous projections would provide investors with important insights into the limitations of projections.

(e) *Commission policy on security ratings.* In view of the importance of security ratings ("ratings") to investors and the marketplace, the Commission permits small business issuers to disclose ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. In addition, the Commission permits disclosure of ratings assigned by any nationally recognized statistical rating organizations ("NRSROs") in certain communications deemed not to be a prospectus ("tombstone advertisements"). Below are the Commission's views on important matters to be considered in disclosing security ratings.

(1)(i) If a small business issuer includes in a filing any rating(s) assigned to a class of securities, it should consider including any other rating assigned by a different NRSRO that is materially different. A statement that a security rating is not a recommendation to buy, sell or hold securities and

that it may be subject to revision or withdrawal at any time by the assigning rating organization should also be included.

(ii)(A) If the rating is included in a filing under the Securities Act, the written consent of any rating organization that is not a NRSRO whose rating is included should be filed. The consent of any NRSRO is not required. (See Rule 436(g) under the Securities Act (§230.436(g) of this chapter.)

(B) If a change in a rating already included is available before effectiveness of the registration statement, the small business issuer should consider including such rating change in the prospectus. If the rating change is material, consideration should be given to recirculating the preliminary prospectus.

(C) If a materially different additional NRSRO rating or a material change in a rating already included becomes available during any period in which offers or sales are being made, the small business issuer should consider disclosing this information in a sticker to the prospectus.

(iii) If there is a material change in the rating(s) assigned by any NRSRO(s) to any outstanding class(es) of securities of a reporting company, the registrant should consider filing a report on Form 8-K (§249.308 of this chapter) or other appropriate report under the Exchange Act disclosing such rating change.

(2) [Reserved]

(f) *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than

five years may be incorporated by reference except:

(1) Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

(2) Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

(g) *Quantitative and qualitative disclosures about market risk.* The safe harbor provision included in paragraph (d) of Item 305 of Regulation S-K (§229.305(d) of this chapter) shall apply to information required by Item 305 of Regulation S-K (§229.305 of this chapter) that is voluntarily provided by or on behalf of a small business issuer as defined in Rule 12b-2 of the Exchange Act.

NOTE TO PARAGRAPH (g): Such small business issuers are not required to provide the information required by Item 305 of Regulation S-K.

(h) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (h)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding

the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (h)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

(B) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03); or

(E) Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures; and

(iii) If the filing is not an annual report on Form 10-KSB (17 CFR 249.310b), a registrant need not include the information required by paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-KSB or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section at the time of the registrant's current filing.

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(2) For purposes of this paragraph (h), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flow that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

(3) For purposes of this paragraph (h), GAAP refers to generally accepted accounting principles in the United States.

(4) For purposes of this paragraph (h), non-GAAP financial measures exclude:

(i) Operating and other statistical measures; and

(ii) Ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (h), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (h) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or

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§ 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 32824, June 23, 1995; 62 FR 6064, Feb. 10, 1997; 62 FR 26388, May 14, 1997; 68 FR 4830, Jan. 30, 2003]

§ 228.101 (Item 101) Description of Business.

(a) *Business Development.* Describe the development of the small business issuer during the last three years. If the small business issuer has not been in business for three years, give the same information for predecessor(s) of the small business issuer if there are any. This business development description should include:

(1) Form and year of organization;

(2) Any bankruptcy, receivership or similar proceeding; and

(3) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(b) *Business of Issuer.* Briefly describe the business and include, to the extent material to an understanding of the issuer:

(1) Principal products or services and their markets;

(2) Distribution methods of the products or services;

(3) Status of any publicly announced new product or service;

(4) Competitive business conditions and the small business issuer's competitive position in the industry and methods of competition;

(5) Sources and availability of raw materials and the names of principal suppliers;

(6) Dependence on one or a few major customers;

(7) Patents, trademarks, licenses, franchises, concessions, royalty agreements or labor contracts, including duration;

(8) Need for any government approval of principal products or services. If government approval is necessary and the small business issuer has not yet received that approval, discuss the status of the approval within the government approval process;

(9) Effect of existing or probable governmental regulations on the business;

(10) Estimate of the amount spent during each of the last two fiscal years

on research and development activities, and if applicable the extent to which the cost of such activities are borne directly by customers;

(11) Costs and effects of compliance with environmental laws (federal, state and local); and

(12) Number of total employees and number of full time employees.

(c) *Reports to security holders.* Disclose the following in any registration statement you file under the Securities Act of 1933:

(1) If you are not required to deliver an annual report to security holders, whether you will voluntarily send an annual report and whether the report will include audited financial statements;

(2) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the SEC; and

(3) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<http://www.sec.gov>). You are encouraged to give your Internet address, if available.

(d) *Canadian Issuers.* Provide the information required by Items 101(f)(2) and 101(g) of Regulation S-K (§ 229.101(f)(2) and (g)).

[57 FR 36449, Aug. 13, 1992, as amended at 63 FR 6379, Feb. 6, 1998]

§ 228.102 (Item 102) Description of Property.

(a) Give the location of the principal plants and other property of the small business issuer and describe the condition of the property. If the small business issuer does not have complete ownership of the property, for example, others also own the property or there is a mortgage or lien on the property,

describe the limitations on the ownership.

Instructions to Item 102(a): 1. Small business issuers engaged in significant mining operations also should provide the information in Guide 7 (§ 229.801(g) and § 229.802(g) of this chapter).

2. Small business issuers engaged in oil and gas producing activities also should provide the information in Guide 2 (§ 229.801(b) and § 229.802(b) of this chapter).

3. Small business issuers engaged in real estate activities should, in addition to Guide 5 (§ 229.801(e) of this chapter) provide responses to the following Items:

(b) *Investment policies.* Describe the policy of the small business issuer with respect to each of the following types of investments. State whether there are any limitations on the percentage of assets which may be invested in any one investment, or type of investment, and indicate whether such policy may be changed without a vote of security holders. State whether it is the small business issuer's policy to acquire assets primarily for possible capital gain or primarily for income.

(1) *Investments in real estate or interests in real estate.* Indicate the types of real estate in which the small business issuer may invest, for example, office or apartment buildings, shopping centers, industrial or commercial properties, special purpose buildings and undeveloped acreage, and the geographic area(s) of these properties. Briefly describe the method, or proposed method, of operating and financing these properties. Indicate any limitations on the number or amount of mortgages which may be placed on any one piece of property.

(2) *Investments in real estate mortgages.* Indicate the types of mortgages, for example, first or second mortgages, and the types of properties subject to mortgages in which the small business issuer intends to invest, for example, single family dwellings, apartment buildings, office buildings, unimproved land, and the nature of any guarantees or insurance. Describe each type of mortgage activity in which the small business issuer intends to engage such as originating, servicing and warehousing, and the portfolio turnover policy.

(3) *Securities of or interests in persons primarily engaged in real estate activities.*

Indicate the types of securities in which the small business issuer may invest, for example, common stock, interest in real estate investment trusts, partnership interests. Indicate the primary activities of persons in which the small business issuer will invest, such as mortgage sales, investments in developed or undeveloped properties and state the investment policies of such persons.

(c) *Description of real estate and operating data.* This information shall be furnished separately for each property the book value of which amounts to ten percent or more of the total assets of the small business issuer and its consolidated subsidiaries for the last fiscal year. With respect to other properties, the information shall be given by such classes or groups and in such detail as will reasonably convey the information required.

(1) Describe the general character and location of all materially important properties held or intended to be acquired by or leased to the small business issuer and describe the present or proposed use of such properties and their suitability and adequacy for such use. Properties not yet acquired shall be identified as such.

(2) State the nature of the small business issuer's title to, or other interest in such properties and the nature and amount of all material mortgages, liens or encumbrances against such properties. Disclose the current principal amount of each material encumbrance, interest and amortization provisions, prepayment provisions, maturity date and the balance due at maturity assuming no prepayments.

(3) Outline briefly the principal terms of any lease of any of such properties or any option or contract to purchase or sell any of such properties.

(4) Outline briefly any proposed program for the renovation, improvement or development of such properties, including the estimated cost thereof and the method of financing to be used. If there are no present plans for the improvement or development of any unimproved or undeveloped property, so state and indicate the purpose for which the property is to be held or acquired.

(5) Describe the general competitive conditions to which the properties are or may be subject.

(6) Include a statement as to whether, in the opinion of the management of the small business issuer, the properties are adequately covered by insurance.

(7) With respect to each improved property which is separately described, provide the following in addition to the above:

- (i) Occupancy rate;
- (ii) Number of tenants occupying ten percent or more of the rentable square footage and principal nature of business of each such tenant and the principal provisions of each of their leases;
- (iii) Principal business, occupations and professions carried on in, or from the building;
- (iv) The average effective annual rental per square foot or unit;
- (v) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed, stating:
 - (A) the number of tenants whose leases will expire,
 - (B) the total area in square feet covered by such leases,
 - (C) the annual rental represented by such leases, and
 - (D) the percentage of gross annual rental represented by such leases;
- (vi) Each of the properties and components thereof upon which depreciation is taken, setting forth the:
 - (A) federal tax basis,
 - (B) rate,
 - (C) method, and
 - (D) life claimed with respect to such property or component thereof for purposes of depreciation;
- (vii) The realty tax rate, annual realty taxes and estimated taxes on any proposed improvements.

Instruction: If the small business issuer has a number of properties, the information may be given in tabular form.

§ 228.103 (Item 103) Legal Proceedings.

(a) If a small business issuer is a party to any pending legal proceeding (or its property is the subject of a pending legal proceeding), give the following information (no information is necessary as to routine litigation that is incidental to the business):

- (1) Name of court or agency where proceeding is pending;
- (2) Date proceeding began;
- (3) Principal parties;
- (4) Description of facts underlying the proceedings; and
- (5) Relief sought.

(b) Include the information called for by paragraphs (a) (1) through (5) of this Item for any proceeding that a governmental authority is contemplating (if the small business issuer is aware of the proceeding).

Instructions to Item 103: 1. A proceeding that primarily involves a claim for damages does not need to be described if the amount involved, exclusive of interest and costs, does not exceed 10% of the current assets of the small business issuer. If any proceeding presents the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

2. The following types of proceedings with respect to the registrant are not "routine litigation incidental to the business" and, notwithstanding instruction 1 of this Item, must be described: bankruptcy, receivership, or similar proceeding.

3. Any proceeding that involves federal, state or local environmental laws must be described if it is material; involves a damages claim for more than 10% of the current assets of the issuer; or potentially involves more than \$100,000 in sanctions and a governmental authority is a party.

4. Disclose any material proceeding to which any director, officer or affiliate of the issuer, any owner of record or beneficially of more than 5% of any class of voting securities of the small business issuer, or security holder is a party adverse to the small business issuer or has a material interest adverse to the small business issuer.

§ 228.201 (Item 201) Market for Common Equity and Related Stockholder Matters.

(a) *Market information.* (1) Identify the principal market or markets where the small business issuer's common equity is traded. If there is no public trading market, so state.

(i) If the principal market for the small business issuer's common equity is an exchange, give the high and low sales prices for each quarter within the last two fiscal years and any subsequent interim period for which financial statements are required by Item 310(b).

(ii) If the principal market is not an exchange, give the range of high and low bid information for the small business issuer's common equity for each quarter within the last two fiscal years and any subsequent interim period for which financial statements are required by Item 310(b). Show the source of the high and low bid information. If over-the-counter market quotations are provided, also state that the quotations reflect inter-dealer prices, without retail mark-up, mark-down or commission and may not represent actual transactions.

(2) If the information called for by paragraph (a) of this Item is being presented in a registration statement relating to a class of common equity for which at the time of filing there is no established public trading market, indicate the amount(s) of common equity:

(i) that is subject to outstanding options or warrants to purchase, or securities convertible into, common equity of the registrant;

(ii) that could be sold pursuant to Rule 144 under the Securities Act or that the registrant has agreed to register under the Securities Act for sale by security holders; or

(iii) that is being or has been proposed to be, publicly offered by the registrant unless such common equity is being offered pursuant to an employee benefit plan (or dividend reinvestment plan), the offering of which could have a material effect on the market price of the registrant's common equity.

(b) *Holders.* Give the approximate number of holders of record of each class of common equity.

(c) *Dividends.* (1) Discuss any cash dividends declared on each class of common equity for the last two fiscal years and in any subsequent period for which financial information is required.

(2) Describe any restrictions that limit the ability to pay dividends on common equity or that are likely to do so in the future.

(d) *Securities authorized for issuance under equity compensation plans.* (1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year

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with respect to compensation plans (including individual compensation arrangements) under which equity securities of the small business issuer are authorized for issuance, aggregated as follows:

- (i) All compensation plans previously approved by security holders; and
- (ii) All compensation plans not previously approved by security holders.

EQUITY COMPENSATION PLAN INFORMATION

Plan category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a))
	(a)	(b)	(c)
Equity compensation plans approved by security holders			
Equity compensation plans not approved by security holders			
Total			

(2) The table shall include the following information as of the end of the most recently completed fiscal year for each category of equity compensation plan described in paragraph (d)(1) of this Item:

- (i) The number of securities to be issued upon the exercise of outstanding options, warrants and rights (column (a));
- (ii) The weighted-average exercise price of the outstanding options, warrants and rights disclosed pursuant to paragraph (d)(2)(i) of this Item (column (b)); and
- (iii) Other than securities to be issued upon the exercise of the outstanding options, warrants and rights disclosed in paragraph (d)(2)(i) of this Item, the number of securities remaining available for future issuance under the plan (column (c)).

(3) For each compensation plan under which equity securities of the small business issuer are authorized for issuance that was adopted without the approval of security holders, describe briefly, in narrative form, the material features of the plan.

Instructions to paragraph (d). 1. Disclosure shall be provided with respect to any compensation plan and individual compensation arrangement of the small business issuer (or parent, subsidiary or affiliate of the small business issuer) under which equity securities of the small business issuer are authorized for issuance to employees or non-employees (such as directors, consultants, advisors, vendors, customers, suppliers or lend-

ers) in exchange for consideration in the form of goods or services as described in Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation*, or any successor standard. No disclosure is required with respect to:

- a. Any plan, contract or arrangement for the issuance of warrants or rights to all security holders of the small business issuer as such on a pro rata basis (such as a stock rights offering) or
- b. Any employee benefit plan that is intended to meet the qualification requirements of Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)).

2. For purposes of this paragraph, an “individual compensation arrangement” includes, but is not limited to, the following: a written compensation contract within the meaning of “employee benefit plan” under §230.405 of this chapter and a plan (whether or not set forth in any formal document) applicable to one person as provided under Item 402(a)(7)(ii) of Regulation S-B (§228.402(a)(7)(ii)).

3. If more than one class of equity security is issued under its equity compensation plans, a small business issuer should aggregate plan information for each class of security.

4. A small business issuer may aggregate information regarding individual compensation arrangements with the plan information required under paragraph (d)(1)(i) and (ii) of this item, as applicable.

5. A small business issuer may aggregate information regarding a compensation plan assumed in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make subsequent grants or awards of its equity securities with the plan information required under paragraph (d)(1)(i) and (ii) of

this Item, as applicable. A small business issuer shall disclose on an aggregated basis in a footnote to the table the information required under paragraph (d)(2)(i) and (ii) of this Item with respect to any individual options, warrants or rights assumed in connection with a merger, consolidation or other acquisition transaction.

6. To the extent that the number of securities remaining available for future issuance disclosed in column (c) includes securities available for future issuance under any compensation plan or individual compensation arrangement other than upon the exercise of an option, warrant or right, disclose the number of securities and type of plan separately for each such plan in a footnote to the table.

7. If the description of an equity compensation plan set forth in a small business issuer's financial statements contains the disclosure required by paragraph (d)(3) of this Item, a cross-reference to such description will satisfy the requirements of paragraph (d)(3) of this Item.

8. If an equity compensation plan contains a formula for calculating the number of securities available for issuance under the plan, including, without limitation, a formula that automatically increases the number of securities available for issuance by a percentage of the number of outstanding securities of the small business issuer, a description of this formula shall be disclosed in a footnote to the table.

9. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

Instruction: Canadian issuers should, in addition to the information called for by this Item, provide the information in Item 201(a)(1)(iv) of Regulation S-K and Instruction 4 thereto.

[57 FR 36449, Aug. 13, 1992, as amended at 67 FR 245]

§ 228.202 (Item 202) Description of Securities.

(a) *Common or Preferred Stock.* (1) If the small business issuer is offering common equity, describe any dividend, voting and preemption rights.

(2) If the small business issuer is offering preferred stock, describe the dividend, voting, conversion and liquidation rights as well as redemption or sinking fund provisions.

(3) Describe any other material rights of common or preferred stockholders.

(4) Describe any provision in the charter or by-laws that would delay, defer or prevent a change in control of the small business issuer.

(b) *Debt Securities.* (1) If the small business issuer is offering debt securities, describe the maturity date, interest rate, conversion or redemption features and sinking fund requirements.

(2) Describe all other material provisions giving or limiting the rights of debtholders. For example, describe subordination provisions, limitations on the declaration of dividends, restrictions on the issuance of additional debt, maintenance of asset ratios, etc.

(3) Give the name of any trustee(s) designated by the indenture and describe the circumstances under which the trustee must act on behalf of the debtholders.

(4) Discuss the tax effects of any securities offered at an "original issue discount."

(c) *Other Securities To Be Registered.* If the small business issuer is registering other securities, provide similar information concerning the material provisions of those securities.

§ 228.303 (Item 303) Management's Discussion and Analysis or Plan of Operation.

Small business issuers that have not had revenues from operations in each of the last two fiscal years, or the last fiscal year and any interim period in the current fiscal year for which financial statements are furnished in the disclosure document, shall provide the information in paragraphs (a) and (c) of this Item. All other issuers shall provide the information in paragraphs (b) and (c) of this Item.

(a) *Plan of Operation.* (1) Describe the small business issuer's plan of operation for the next twelve months. This description should include such matters as:

(i) a discussion of how long the small business issuer can satisfy its cash requirements and whether it will have to raise additional funds in the next twelve months;

(ii) a summary of any product research and development that the small business issuer will perform for the term of the plan;

- (iii) any expected purchase or sale of plant and significant equipment; and
- (iv) any expected significant changes in the number of employees.

(2) [Reserved]

(b) *Management's Discussion and Analysis of Financial Condition and Results of Operations*—(1) *Full fiscal years*. Discuss the small business issuer's financial condition, changes in financial condition and results of operations for each of the last two fiscal years. This discussion should address the past and future financial condition and results of operation of the small business issuer, with particular emphasis on the prospects for the future. The discussion should also address those key variable and other qualitative and quantitative factors which are necessary to an understanding and evaluation of the small business issuer. If material, the small business issuer should disclose the following:

- (i) Any known trends, events or uncertainties that have or are reasonably likely to have a material impact on the small business issuer's short-term or long-term liquidity;
- (ii) Internal and external sources of liquidity;
- (iii) Any material commitments for capital expenditures and the expected sources of funds for such expenditures;
- (iv) Any known trends, events or uncertainties that have had or that are reasonably expected to have a material impact on the net sales or revenues or income from continuing operations;
- (v) Any significant elements of income or loss that do not arise from the small business issuer's continuing operations;
- (vi) The causes for any material changes from period to period in one or more line items of the small business issuer's financial statements; and
- (vii) Any seasonal aspects that had a material effect on the financial condition or results of operation.

(2) *Interim Periods*. If the small business issuer must include interim financial statements in the registration statement or report, provide a comparable discussion that will enable the reader to assess material changes in financial condition and results of operations since the end of the last fiscal

year and for the comparable interim period in the preceding year.

(c) *Off-balance sheet arrangements*. (1) In a separately-captioned section, discuss the small business issuer's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the small business issuer's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The disclosure shall include the items specified in paragraphs (c)(1)(i), (ii), (iii) and (iv) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the small business issuer believes is necessary for such an understanding.

(i) The nature and business purpose to the small business issuer of such off-balance sheet arrangements;

(ii) The importance to the small business issuer of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support or other benefits;

(iii) The amounts of revenues, expenses and cash flows of the small business issuer arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the small business issuer in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the small business issuer arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and

(iv) Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the small business issuer, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the small business issuer has taken or proposes to take in response to any such circumstances.

(2) As used in paragraph (c) of this Item, the term *off-balance sheet arrangement* means any transaction,

agreement or other contractual arrangement to which an entity unconsolidated with the small business issuer is a party, under which the small business issuer has:

(i) Any obligation under a guarantee contract that has any of the characteristics identified in paragraph 3 of FASB Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) ("FIN 45"), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FIN 45 pursuant to paragraphs 6 or 7 of that Interpretation;

(ii) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(iii) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the small business issuer's own stock and classified in stockholders' equity in the small business issuer's statement of financial position, and therefore excluded from the scope of FASB Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998), pursuant to paragraph 11(a) of that Statement, as may be modified or supplemented; or

(iv) Any obligation, including a contingent obligation, arising out of a variable interest (as referenced in FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the small business issuer, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the small business issuer.

Instructions to paragraph (c) of Item 303. 1. No obligation to make disclosure under paragraph (c) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding

or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

2. Small business issuers should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.

3. For purposes of paragraph (c) of this Item only, contingent liabilities arising out of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.

4. Generally, the disclosure required by paragraph (c) of this Item shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure.

5. In satisfying the requirements of paragraph (c) of this Item, the discussion of off-balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the footnotes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.

(d) *Safe harbor.* (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z-2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbors") shall apply to forward-looking information provided pursuant to paragraph (c) of this Item, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by

the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (d) of this Item only:

(i) All information required by paragraph (c) of this Item is deemed to be a "forward looking statement" as that term is defined in the statutory safe harbors, except for historical facts.

(ii) With respect to paragraph (c) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a small business issuer satisfies all requirements of that same paragraph (c) of this Item.

Instructions to Item 303: 1. The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.

2. Small business issuers are encouraged, but not required, to supply forward looking information. This is distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials. This latter data may be required to be disclosed.

[57 FR 36449, Aug. 13, 1992, as amended at 68 FR 5998, Feb. 5, 2003]

§ 228.304 (Item 304) Changes In and Disagreements With Accountants on Accounting and Financial Disclosure.

(a)(1) If, during the small business issuer's two most recent fiscal years or any later interim period, the principal independent accountant or a significant subsidiary's independent accountant on whom the principal accountant expressed reliance in its report, resigned (or declined to stand for re-election) or was dismissed, then the small business issuer shall state:

(i) Whether the former accountant resigned, declined to stand for re-election or was dismissed and the date;

(ii) Whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or disclaimer of opinion, or was modified as to uncertainty, audit scope, or ac-

counting principles, and also describe the nature of each such adverse opinion, disclaimer of opinion or modification;

(iii) Whether the decision to change accountants was recommended or approved by the board of directors or an audit or similar committee of the board of directors; and

(iv)(A) Whether there were any disagreements with the former accountant, whether or not resolved, on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which, if not resolved to the former accountant's satisfaction, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report; or

(B) The following information only if applicable. Indicate whether the former accountant advised the small business issuer that:

(1) internal controls necessary to develop reliable financial statements did not exist; or

(2) information has come to the attention of the former accountant which made the accountant unwilling to rely on management's representations, or unwilling to be associated with the financial statements prepared by management; or

(3) the scope of the audit should be expanded significantly, or information has come to the accountant's attention that the accountant has concluded will, or if further investigated might, materially impact the fairness or reliability of a previously issued audit report or the underlying financial statements, or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent audited financial statements (including information that might preclude the issuance of an unqualified audit report), and the issue was not resolved to the accountant's satisfaction prior to its resignation or dismissal; and

(C) The subject matter of each such disagreement or event identified in response to paragraph (a)(1)(iv) of this Item;

(D) Whether any committee of the board of directors, or the board of directors, discussed the subject matter of

the disagreement with the former accountant; and

(E) Whether the small business issuer has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements or events and, if not, describe the nature of and reason for any limitation.

(2) If during the period specified in paragraph (a)(1) of this Item, a new accountant has been engaged as either the principal accountant to audit the issuer's financial statements or as the auditor of a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, identify the new accountant and the engagement date. Additionally, if the issuer (or someone on its behalf) consulted the new accountant regarding:

(i) The application of accounting principles to a specific completed or contemplated transaction, or the type of audit opinion that might be rendered on the small business issuer's financial statements and either written or oral advice was provided that was an important factor considered by the small business issuer in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was the subject of a disagreement or event identified in response to paragraph (a)(1)(iv) of this Item, then the small business issuer shall:

(A) Identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the new accountant given to the small business issuer and, if written views were received by the small business issuer, file them as an exhibit to the report or registration statement;

(C) State whether the former accountant was consulted by the small business issuer regarding any such issues, and if so, describe the former accountant's views; and

(D) Request the new accountant to review the disclosure required by this Item before it is filed with the Commission and provide the new accountant the opportunity to furnish the small business issuer with a letter addressed to the Commission containing

any new information, clarification of the small business issuer's expression of its views, or the respects in which it does not agree with the statements made in response to this Item. Any such letter shall be filed as an exhibit to the report or registration statement containing the disclosure required by this Item.

(3) The small business issuer shall provide the former accountant with a copy of the disclosures it is making in response to this Item no later than the day that the disclosures are filed with the Commission. The small business issuer shall request the former accountant to furnish a letter addressed to the Commission stating whether it agrees with the statements made by the issuer and, if not, stating the respects in which it does not agree. The small business issuer shall file the letter as an exhibit to the report or registration statement containing this disclosure. If the letter is unavailable at the time of filing, the small business issuer shall request the former accountant to provide the letter so that it can be filed with the Commission within ten business days after the filing of the report or registration statement. Notwithstanding the ten business day period, the letter shall be filed within two business days of receipt. The former accountant may provide an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming within the ten business day period noted above. The interim letter, if any, shall be filed with the report or registration statement or by amendment within two business days of receipt.

(b) If the conditions in paragraphs (b)(1) through (b)(3) of this Item exist, the small business issuer shall describe the nature of the disagreement or event and the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required (unless that method ceases to be generally accepted because of authoritative standards or interpretations issued after the disagreement or event):

(1) In connection with a change in accountants subject to paragraph (a) of

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this Item, there was any disagreement or event as described in paragraph (a)(1)(iv) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the later fiscal year, there have been any transactions or events similar to those involved in such disagreement or event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required.

Instructions to Item 304: 1. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported as that term is defined in Rule 12b-2 under the Exchange Act (§240.12b-2); the disclosure called for by paragraph (a) of this Item must be provided, however, notwithstanding prior disclosure, if required pursuant to Item 9 of Schedule 14A (§249.14a-101 *et seq.*). The disclosure called for by paragraph (b) of this Item must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

2. When disclosure is required by paragraph (a) of this Item in an annual report to security holders pursuant to Rule 14a-3 or Rule 14c-3 (§240.14a-3 or 240.14c-3 of this chapter), or in a proxy or information statement filed pursuant to the requirements of Schedule 14A (§240.14a-101 *et seq.*) or 14C (§240.14c-101 *et seq.*), in lieu of a letter pursuant to paragraph (a)(2)(ii)(D) or (a)(3) of this Item, before filing such materials with or furnishing such materials to the Commission, the small business issuer shall furnish the disclosure required by paragraph (a) of this Item to each accountant who was engaged during the period set forth in paragraph (a) of this Item. If any such accountant believes that the statements made in response to paragraph (a) of this Item are incorrect or incomplete, it may present its views in a brief statement, ordinarily expected not to exceed 200 words, to be included in the annual report or proxy or information statement. This statement shall be submitted to the small business issuer within ten business days of the date the accountant receives the small business issuer's disclosure. Further, unless the written views of the newly engaged accountant required to be filed as an exhibit by paragraph (a)(2)(ii)(D) of this Item have been previously filed with the Commission, the small business issuer shall file a Form 8-K (17 CFR 249.308 of this chapter) along with the annual report or proxy or information statement for the purpose of filing the written views as exhibits.

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3. The information required by this Item need not be provided for a company being acquired by the small business issuer if such acquiree has not been subject to the filing requirements of either section 13(a) or 15(d) of the Exchange Act, or, because of section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a-3 or Rule 14c-3 (§240.14a-3 or 240.14c-3 of this chapter) for its latest fiscal year.

4. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm's opinion (or their designee) will generally suffice as the accountant advising the small business issuer of a reportable event or as a statement of a disagreement at the "decision-making level" within the accounting firm and require disclosure under this Item.

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§ 228.306 (Item 306) Audit committee report.

(a) The audit committee must state whether:

(1) The audit committee has reviewed and discussed the audited financial statements with management;

(2) The audit committee has discussed with the independent auditors the matters required to be discussed by SAS 61, as may be modified or supplemented;

(3) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as may be modified or supplemented, and has discussed with the independent accountant the independent accountant's independence; and

(4) Based on the review and discussions referred to in paragraphs (a)(1) through (a)(3) of this Item, the audit committee recommended to the Board of Directors that the audited financial statements be included in the company's Annual Report on Form 10-KSB (17 CFR 249.310b) for the last fiscal year for filing with the Commission.

(b) The name of each member of the company's audit committee (or, in the absence of an audit committee, the

board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by this Item.

(c) The information required by paragraphs (a) and (b) of this Item shall not be deemed to be "soliciting material," or to be "filed" with the Commission or subject to Regulation 14A or 14C (17 CFR 240.14a-1 *et seq.* or 240.14c-1 *et seq.*), other than as provided in this Item, or to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the company specifically requests that the information be treated as soliciting material or specifically incorporates it by reference into a document filed under the Securities Act or the Exchange Act.

(d) The information required by paragraphs (a) and (b) of this Item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

[64 FR 73401, Dec. 30, 1999]

§ 228.307 (Item 307) Disclosure controls and procedures.

Disclose the conclusions of the small business issuer's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the small business issuer's disclosure controls and procedures (as defined in § 240.13a-15(e) or 240.15d-15(e) of this chapter) as of the end of the period covered by the report, based on the evaluation of these controls and procedures required by paragraph (b) of § 240.13a-15 or 240.15d-15 of this chapter.

[68 FR 36660, June 18, 2003]

§ 228.308 (Item 308) Internal control over financial reporting.

(a) *Management's annual report on internal control over financial reporting.* Provide a report of management on the small business issuer's internal control

over financial reporting (as defined in § 240.13a-15(f) or 240.15d-15(f) of this chapter) that contains:

(1) A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the small business issuer;

(2) A statement identifying the framework used by management to evaluate the effectiveness of the small business issuer's internal control over financial reporting as required by paragraph (c) of § 240.13a-15 or 240.15d-15 of this chapter;

(3) Management's assessment of the effectiveness of the small business issuer's internal control over financial reporting as of the end of the small business issuer's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective. This discussion must include disclosure of any material weakness in the small business issuer's internal control over financial reporting identified by management. Management is not permitted to conclude that the small business issuer's internal control over financial reporting is effective if there are one or more material weaknesses in the small business issuer's internal control over financial reporting; and

(4) A statement that the registered public accounting firm that audited the financial statements included in the annual report containing the disclosure required by this Item has issued an attestation report on management's assessment of the small business issuer's internal control over financial reporting.

(b) *Attestation report of the registered public accounting firm.* Provide the registered public accounting firm's attestation report on management's assessment of the small business issuer's internal control over financial reporting in the small business issuer's annual report containing the disclosure required by this Item.

(c) *Changes in internal control over financial reporting.* Disclose any change in the small business issuer's internal control over financial reporting identified in connection with the evaluation required by paragraph (d) of § 240.13a-15

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or 240.15d-15 of this chapter that occurred during the small business issuer's last fiscal quarter (the small business issuer's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the small business issuer's internal control over financial reporting.

Instructions to Item 308: 1. The small business issuer must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the small business issuer's internal control over financial reporting.

2. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a-14(g) and § 240.15d-14(g) of this chapter) is not required to disclose the information required by this Item.

[68 FR 36661, June 18, 2003]

§ 228.310 (Item 310) Financial Statements.

NOTES: 1. Financial statements of a small business issuer, its predecessors or any businesses to which the small business issuer is a successor shall be prepared in accordance with generally accepted accounting principles in the United States.

2. Regulation S-X (17 CFR 210.1 through 210.12) Form and Content of and Requirements for Financial Statements shall not apply to the preparation of such financial statements, except that the report and qualifications of the independent accountant shall comply with the requirements of Article 2 of Regulation S-X (17 CFR 210.2), Item 8.A of Form 20-F (17 CFR 249.220f) and Article 3-20 of Regulation S-X (17 CFR 210.3-20) shall apply to financial statements of foreign private issuers, the description of accounting policies shall comply with Article 4-08(n) of Regulation S-X (17 CFR 210.4-08(n)), and small business issuers engaged in oil and gas producing activities shall follow the financial accounting and reporting standards specified in Article 4-10 of Regulation S-X (17 CFR 210.4-10) with respect to such activities. To the extent that Article 11-01 [17 CFR 210.11-01] (Pro Forma Presentation Requirements) offers enhanced guidelines for the preparation, presentation and disclosure of pro forma financial information, small business issuers may wish to consider these items. Financial statements of foreign private issuers shall be prepared and presented in accordance with the requirements of Item 18 of Form 20-F except that Item 17 may be followed for financial statements included in filings other than registration statements for offerings of securities unless the only securities being offered are: (a) upon the exer-

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cise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted by the issuer of the securities to be offered, if such rights are granted on a pro rata basis to all existing securities holders of the class of securities to which the rights attach and there is no standby underwriting in the United States or similar arrangement; or (b) pursuant to a dividend or interest reinvestment plan; or (c) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferrable warrants issued by the issuer of the securities being offered, or by an affiliate of such issuer.

3. Financial statements for a subsidiary of a small business issuer that issues securities guaranteed by the small business issuer or guarantees securities issued by the small business issuer must be presented as required by Rule 3-10 of Regulation S-X (17 CFR 210.3-10), except that the periods presented are those required by paragraph (a) of this item.

4. Financial statements for a small business issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities registered or being registered must be presented as required by Rule 3-16 of Regulation S-X (17 CFR 210.3-16), except that the periods presented are those required by paragraph (a) of this item.

5. The Commission, where consistent with the protection of investors, may permit the omission of one or more of the financial statements or the substitution of appropriate statements of comparable character. The Commission by informal written notice may require the filing of other financial statements where necessary or appropriate.

(a) *Annual Financial Statements.* Small business issuers shall file an audited balance sheet as of the end of the most recent fiscal year, or as of a date within 135 days if the issuers existed for a period less than one fiscal year, and audited statements of income, cash flows and changes in stockholders' equity for each of the two fiscal years preceding the date of such audited balance sheet (or such shorter period as the registrant has been in business).

(b) *Interim Financial Statements.* Interim financial statements may be unaudited; however, prior to filing, interim financial statements included in quarterly reports on Form 10-QSB (17 CFR 249.308b) must be reviewed by an independent public accountant using professional standards and procedures for conducting such reviews, as established by generally accepted auditing standards, as may be modified or supplemented by the Commission. If, in

any filing, the issuer states that interim financial statements have been reviewed by an independent public accountant, a report of the accountant on the review must be filed with the interim financial statements. Interim financial statements shall include a balance sheet as of the end of the issuer's most recent fiscal quarter and income statements and statements of cash flows for the interim period up to the date of such balance sheet and the comparable period of the preceding fiscal year.

Instructions to Item 310(b): 1. Where Item 310 is applicable to a Form 10-QSB (§249.308b) and the interim period is more than one quarter, income statements must also be provided for the most recent interim quarter and the comparable quarter of the preceding fiscal year.

2. Interim financial statements must include all adjustments which in the opinion of management are necessary in order to make the financial statements not misleading. An affirmative statement that the financial statements have been so adjusted must be included with the interim financial statements.

(1) *Condensed Format.* Interim financial statements may be condensed as follows:

(i) Balance sheets should include separate captions for each balance sheet component presented in the annual financial statements which represents 10% or more of total assets. Cash and retained earnings should be presented regardless of relative significance to total assets. Registrants which present a classified balance sheet in their annual financial statements should present totals for current assets and current liabilities.

(ii) Income statements should include net sales or gross revenue, each cost and expense category presented in the annual financial statements which exceeds 20% of sales or gross revenues, provision for income taxes, discontinued operations, extraordinary items and cumulative effects of changes in accounting principles or practices. (Financial institutions should substitute net interest income for sales for purposes of determining items to be disclosed.) Dividends per share should be presented.

(iii) Cash flow statements should include cash flows from operating, in-

vesting and financing activities as well as cash at the beginning and end of each period and the increase or decrease in such balance.

(iv) Additional line items may be presented to facilitate the usefulness of the interim financial statements including their comparability with annual financial statements.

(2) *Disclosure required and additional instructions as to Content.*—(i) *Footnotes.* Footnote and other disclosures should be provided as needed for fair presentation and to ensure that the financial statements are not misleading.

(ii) *Material Subsequent Events and Contingencies.* Disclosure must be provided of material subsequent events and material contingencies notwithstanding disclosure in the annual financial statements.

(iii) *Significant Equity Investees.* Sales, gross profit, net income (loss) from continuing operations and net income must be disclosed for equity investees which constitute 20% or more of a registrant's consolidated assets, equity or income from continuing operations.

(iv) *Significant Dispositions and Purchase Business Combinations.* If a significant disposition or purchase business combination has occurred during the most recent interim period and the transaction required the filing of a Form 8-K (§249.308 of this chapter), pro forma data must be presented which reflects revenue, income from continuing operations, net income and income per share for the current interim period and the corresponding interim period of the preceding fiscal year as though the transaction occurred at the beginning of the periods.

(v) *Material Accounting Changes.* Disclosure must be provided of the date and reasons for any material accounting change. The registrant's independent accountant must provide a letter in the first Form 10-QSB (§249.308b of this chapter) filed subsequent to the change indicating whether or not the change is to a preferable method. Disclosure must be provided of any retroactive change to prior period financial statements, including the effect of any such change on income and income per share.

(vi) *Development Stage Companies.* A registrant in the development stage

must provide cumulative from inception financial information.

(c) *Financial Statements of Businesses Acquired or to be Acquired.* (1) If a business combination accounted for as a “purchase” has occurred or is probable, or if a business combination accounted for as a “pooling of interest” is probable, financial statements of the business acquired or to be acquired shall be furnished for the periods specified in paragraph (c)(3) of this Item.

(i) The term “purchase” encompasses the purchase of an interest in a business accounted for by the equity method.

(ii) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the issuer have been filed shall be treated as if they are a single business combination for purposes of this section. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. A group of businesses are deemed to be related if:

(A) They are under common control or management;

(B) The acquisition of one business is conditional on the acquisition of each other business; or

(C) Each acquisition is conditioned on a single common event.

(iii) Annual financial statements required by this paragraph (c) shall be audited. The form and content of the financial statements shall be in accordance with paragraphs (a) and (b) of this Item.

(2) The periods for which financial statements are to be presented are determined by comparison of the most recent annual financial statements of the business acquired or to be acquired and the small business issuer's most recent annual financial statements filed at or prior to the date of acquisition to evaluate each of the following conditions:

(i) Compare the small business issuer's investments in and advances to the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year. For a proposed business

combination to be accounted for as a pooling of interests, also compare the number of common shares exchanged or to be exchanged by the small business issuer to its total common shares outstanding at the date the combination is initiated.

(ii) Compare the small business issuer's proportionate share of the total assets (after intercompany eliminations) of the acquiree to the total consolidated assets of the small business issuer as of the end of the most recently completed fiscal year.

(iii) Compare the small business issuer's equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principles of the acquiree to such consolidated income of the small business issuer for the most recently completed fiscal year.

Computational note to paragraph (c)(2): For purposes of making the prescribed income test the following guidance should be applied: If income of the small business issuer and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

(3)(i) If none of the conditions specified in paragraph (c)(2) of this Item exceeds 20%, financial statements are not required. If any of the conditions exceed 20%, but none exceeds 40%, financial statements shall be furnished for the most recent fiscal year and any interim periods specified in paragraph (b) of this item. If any of the conditions exceed 40%, financial statements shall be furnished for the two most recent fiscal years and any interim periods specified in paragraph (b) of this item.

(ii) The separate audited balance sheet of the acquired business is not required when the small business issuer's most recent audited balance sheet filed is for a date after the acquisition was consummated.

(iii) If the aggregate impact of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial

majority of the businesses acquired shall be furnished. Such financial statements shall be for the most recent fiscal year and any interim periods specified in paragraph (b) of this Item.

(iv) Registration statements not subject to the provisions of § 230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not meet or exceed any of the conditions specified in paragraph (c)(2) of this Item at the 50 percent level, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The effective date of the registration statement, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not been filed previously by the registrant.

(v) An issuer that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (c)(3)(iv) of this section shall furnish those financial statements and any pro forma information specified by paragraph (d) of this Item under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(4) If the small business issuer made a significant business acquisition subsequent to the latest fiscal year end and filed a report on Form 8-K which included audited financial statements of such acquired business for the periods required by paragraph (c)(3) of this Item and the pro forma financial information required by paragraph (d) of this Item, the determination of significance may be made by using pro forma amounts for the latest fiscal year in the report on Form 8-K rather than by using the historical amounts of the registrant. The tests may not be made by "annualizing" data.

(d) *Pro Forma Financial Information.*

(1) Pro forma information showing the effects of the acquisition shall be furnished if financial statements of a business acquired or to be acquired are presented.

(2) Pro forma statements should be condensed, in columnar form showing

pro forma adjustments and results and should include the following:

(i) If the transaction was consummated during the most recent fiscal year or subsequent interim period, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, or;

(ii) If consummation of the transaction has occurred or is probable after the date of the most recent balance sheet required by paragraph (a) or (b) of this Item, a pro forma balance sheet giving effect to the combination as of the date of the most recent balance sheet. For a purchase, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, and for a pooling of interests, pro forma statements of income for all periods for which income statements of the small business issuer are required.

(e) *Real Estate Operations Acquired or to be Acquired.* If, during the period for which income statements are required, the small business issuer has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required by paragraph (a) or (b) of this Item, has acquired or proposes to acquire one or more properties which in the aggregate are significant, the following shall be furnished with respect to such properties:

(1) Audited income statements (not including earnings per unit) for the two most recent years, which shall exclude items not comparable to the proposed future operations of the property such as mortgage interest, leasehold rental, depreciation, corporate expenses and federal and state income taxes; *Provided, however,* That such audited statements need be presented for only the most recent fiscal year if:

(i) the property is not acquired from a related party;

(ii) material factors considered by the small business issuer in assessing the property are described with specificity in the registration statement with regard to the property, including source of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expenses (including but not

limited to, utilities, *ad valorem* tax rates, maintenance expenses, capital improvements anticipated); and

(iii) the small business issuer indicates that, after reasonable inquiry, it is not aware of any material factors relating to the specific property other than those discussed in response to paragraph (e)(1)(ii) of this Item that would cause the reported financial information not to be necessarily indicative of future operating results.

(2) If the property will be operated by the small business issuer, a statement shall be furnished showing the estimated taxable operating results of the small business issuer based on the most recent twelve-month period including such adjustments as can be factually supported. If the property will be acquired subject to a net lease, the estimated taxable operating results shall be based on the rent to be paid for the first year of the lease. In either case, the estimated amount of cash to be made available by operations shall be shown. Disclosure must be provided of the principal assumptions which have been made in preparing the statements of estimated taxable operating results and cash to be made available by operations.

(3) If appropriate under the circumstances, a table should be provided which shows, for a limited number of years, the estimated cash distribution per unit indicating the portion reportable as taxable income and the portion representing a return of capital with an explanation of annual variations, if any. If taxable net income per unit will be greater than the cash available for distribution per unit, that fact and approximate year of occurrence shall be stated, if significant.

(f) *Limited Partnerships.* (1) Small business issuers which are limited partnerships must provide the balance sheets of the general partners as described in paragraphs (f)(2) through (f)(4) of this Item.

(2) Where a general partner is a corporation, the audited balance sheet of the corporation as of the end of its most recently completed fiscal year must be filed. Receivables, other than trade receivables, from affiliates of the general partner should be deducted from shareholders' equity of the gen-

eral partner. Where an affiliate has committed itself to increase or maintain the general partner's capital, the audited balance sheet of such affiliate must also be presented.

(3) Where a general partner is a partnership, there shall be filed an audited balance sheet of such partnership as of the end of its most recently completed fiscal year.

(4) Where the general partner is a natural person, there shall be filed, as supplemental information, a balance sheet of such natural person as of a recent date. Such balance sheet need not be audited. The assets and liabilities should be carried at estimated fair market value, with provisions for estimated income taxes on unrealized gains. The net worth of such general partner(s), based on such balance sheet(s), singly or in the aggregate, shall be disclosed in the registration statement.

(g) *Age of Financial Statements.* At the date of filing, financial statements included in filings other than filings on Form 10-KSB must be not less current than financial statements which would be required in Forms 10-KSB and 10-QSB if such reports were required to be filed. If required financial statements are as of a date 135 days or more prior to the date a registration statement becomes effective or proxy material is expected to be mailed, the financial statements shall be updated to include financial statements for an interim period ending within 135 days of the effective or expected mailing date. Interim financial statements should be prepared and presented in accordance with paragraph (b) of this Item:

(1) When the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, the filing may include financial statements only as current as the end of the third fiscal quarter; *Provided, however,* That if the audited financial statements for the recently completed fiscal year are available or become available prior to effectiveness or mailing, they must be included in the filing;

(2) If the effective date or anticipated mailing date falls after 45 days but within 90 days of the end of the small business issuer's fiscal year, the small

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business issuer is not required to provide the audited financial statements for such year end provided that the following conditions are met:

(i) If the small business issuer is a reporting company, all reports due must have been filed;

(ii) For the most recent fiscal year for which audited financial statements are not yet available, the small business issuer reasonably and in good faith expects to report income from continuing operations before taxes; and

(iii) For at least one of the two fiscal years immediately preceding the most recent fiscal year the small business issuer reported income from continuing operations before taxes.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 26514, May 4, 1993; 61 FR 54515, Oct. 18, 1996; 62 FR 6064, Feb. 10, 1997; 64 FR 53909, Oct. 5, 1999; 64 FR 73401, Dec. 30, 1999; 65 FR 51710, Aug. 24, 2000]

§ 228.401 (Item 401) Directors, Executive Officers, Promoters and Control Persons.

(a) *Identify directors and executive officers.* (1) List the names and ages of all directors and executive officers and all persons nominated or chosen to become such;

(2) List the positions and offices that each such person held with the small business issuer;

(3) Give the person's term of office as a director and the period during which the person has served;

(4) Briefly describe the person's business experience during the past five years; and

(5) If a director, identify other directorships held in reporting companies naming each company.

(b) *Identify Significant Employees.* Give the information specified in paragraph (a) of this Item for each person who is not an executive officer but who is expected by the small business issuer to make a significant contribution to the business.

(c) *Family relationships.* Describe any family relationships among directors, executive officers, or persons nominated or chosen by the small business issuer to become directors or executive officers.

(d) *Involvement in certain legal proceedings.* Describe any of the following

events that occurred during the past five years that are material to an evaluation of the ability or integrity of any director, person nominated to become a director, executive officer, promoter or control person of the small business issuer:

(1) Any bankruptcy petition filed by or against any business of which such person was a general partner or executive officer either at the time of the bankruptcy or within two years prior to that time;

(2) Any conviction in a criminal proceeding or being subject to a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Being subject to any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining, barring, suspending or otherwise limiting his involvement in any type of business, securities or banking activities; and

(4) Being found by a court of competent jurisdiction (in a civil action), the Commission or the Commodity Futures Trading Commission to have violated a federal or state securities or commodities law, and the judgment has not been reversed, suspended, or vacated.

(e) *Audit committee financial expert.* (1)(i) Disclose that the small business issuer's board of directors has determined that the small business issuer either:

(A) Has at least one audit committee financial expert serving on its audit committee; or

(B) Does not have an audit committee financial expert serving on its audit committee.

(ii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(A) of this Item, it must disclose the name of the audit committee financial expert and whether that person is *independent*, as that term is used in Item 7(d)(3)(iv) of Schedule 14A (240.14a-101 of this chapter) under the Exchange Act.

(iii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(B) of this Item, it must explain why it does not have an audit committee financial expert.

Instruction to paragraph (e)(1) of Item 401. If the small business issuer's board of directors has determined that the small business issuer has more than one audit committee financial expert serving on its audit committee, the small business issuer may, but is not required to, disclose the names of those additional persons. A small business issuer choosing to identify such persons must indicate whether they are independent pursuant to Item 401(e)(1)(ii).

(2) For purposes of this Item, an *audit committee financial expert* means a person who has the following attributes:

- (i) An understanding of generally accepted accounting principles and financial statements;
- (ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;
- (iii) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the small business issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;
- (iv) An understanding of internal control over financial reporting; and
- (v) An understanding of audit committee functions.

(3) A person shall have acquired such attributes through:

- (i) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- (ii) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- (iii) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- (iv) Other relevant experience.

(4) *Safe Harbor.* (i) A person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for purposes of section

11 of the Securities Act of 1933 (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 401.

(ii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(iii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

Instructions to Item 401(e). 1. The disclosure under Item 401(e) is required only in a small business issuer's annual report. The small business issuer need not provide the disclosure required by this Item 401(e) in a proxy or information statement unless that small business issuer is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to general instruction E(3) to Form 10-KSB.

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (e)(3)(iv) of this Item, the small business issuer shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under paragraph (a)(4) of this Item 401 (§ 229.401(a)(4) or this chapter).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of this Item 401(e), the term *board of directors* means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term *generally accepted accounting principles* in paragraph (e)(2)(i) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a-14(g) and § 240.15d-14(g) of this chapter) is not required to disclose the information required by this Item 401(e).

5. Following the effective date of the first registration statement filed under the Securities Act (15 U.S.C. 77a *et seq.*) or Securities Exchange Act (15 U.S.C. 78a *et seq.*) by a small business issuer, the small business

issuer or successor issuer need not make the disclosures required by this Item in its first annual report filed pursuant to Section 13(a) or 15(d) (15 U.S.C. 78m(a) or 78o(d)) of the Exchange Act after effectiveness.

(f) *Identification of the audit committee.*

(1) If you meet the following requirements, provide the disclosure in paragraph (f)(2) of this section:

(i) You are a listed issuer, as defined in § 240.10A-3 of this chapter;

(ii) You are filing either an annual report on Form 10-KSB (17 CFR 249.310b), or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a *et seq.*) if action is to be taken with respect to the election of directors; and

(iii) You are neither:

(A) A subsidiary of another listed issuer that is relying on the exemption in § 240.10A-3(c)(2) of this chapter; nor

(B) Relying on any of the exemptions in § 240.10A-3(c)(4) through (c)(7) of this chapter.

(2)(i) State whether or not the small business issuer has a separately-designated standing audit committee established in accordance with section 3(a)(58)(A) of the Exchange Act (15 U.S.C. 78c(a)(58)(A)), or a committee performing similar functions. If the small business issuer has such a committee, however designated, identify each committee member. If the entire board of directors is acting as the small business issuer's audit committee as specified in section 3(a)(58)(B) of the Exchange Act (15 U.S.C. 78c(a)(58)(B)), so state.

(ii) If applicable, provide the disclosure required by § 240.10A-3(d) of this chapter regarding an exemption from the listing standards for audit committees.

(g) Describe any material changes to the procedures by which security holders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a-101), or this Item.

Instructions to paragraph (g) of Item 401: 1. The disclosure required in paragraph (g) need only be provided in a registrant's quarterly or annual reports.

2. For purposes of paragraph (g), adoption of procedures by which security holders may

recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a-101), or this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

[57 FR 36449, Aug. 13, 1992, as amended at 68 FR 5125, Jan. 31, 2003; 68 FR 15353, Mar. 31, 2003; 68 FR 18817, Apr. 16, 2003; 68 FR 36661, June 18, 2003; 68 FR 69220, Dec. 11, 2003]

§ 228.402 (Item 402) Executive compensation.

(a) *General*—(1) *All compensation covered.* This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(2) of this item, and directors covered by paragraph (f) of this item by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specified in this item. Except as provided by paragraph (a)(4) of this item, all such compensation shall be reported pursuant to this item even if also called for by another requirement, including transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to any such named executive officer or director. No item reported as compensation for one fiscal year need be reported as compensation for a subsequent fiscal year.

(2) *Persons covered.* Disclosure shall be provided pursuant to this item for each of the following (the "named executive officers"):

(i) All individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year ("CEO"), regardless of compensation level;

(ii) The registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(2)(ii) of this item but for the fact that the individual was not serving as an executive officer of the registrant at

the end of the last completed fiscal year.

Instructions to Item 402(a)(2): 1. Determination of Most Highly Compensated Executive Officers. The determination as to which executive officers are most highly compensated shall be made by reference to total annual salary and bonus for the last completed fiscal year (as required to be disclosed pursuant to paragraph (b)(2)(iii)(A) and (B) of this item), but including the dollar value of salary or bonus amounts forgone pursuant to Instruction 3 to paragraph (b)(2)(iii)(A) and (B) of this item, *provided, however*, that no disclosure need be provided for any executive officer, other than the CEO, whose total annual salary and bonus, as so determined, does not exceed \$100,000.

2. Inclusion of Executive Officer of Subsidiary. It may be appropriate in certain circumstances for a registrant to include an executive officer of a subsidiary in the disclosure required by this item. See Rule 3b-7 under the Exchange Act [17 CFR 240.3b-7].

3. Exclusion of Executive Officer due to Unusual or Overseas Compensation. It may be appropriate in limited circumstances for a registrant not to include in the disclosure required by this item an individual, other than its CEO, who is one of the registrant's most highly compensated executive officers. Among the factors that should be considered in determining not to name an individual are: (a) the distribution or accrual of an unusually large amount of cash compensation (such as a bonus or commission) that is not part of a recurring arrangement and is unlikely to continue; and (b) the payment of amounts of cash compensation relating to overseas assignments that may be attributed predominantly to such assignments.

(3) Information for full fiscal year. If the CEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the CEO) served as an executive officer of the registrant (whether or not in the same position) during any part of a fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(4) Transactions with third parties reported under item 404. This item includes transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to a named executive officer. No information need be

given in response to any paragraph of this item as to any such third-party transaction if the transaction has been reported in response to Item 404 of Regulation S-B (§ 228.404).

(5) Omission of table or column. A table or column may be omitted, if there has been no compensation awarded to, earned by or paid to any of the named executives required to be reported in that table or column in any fiscal year covered by that table.

(6) Definitions. For purposes of this item:

(i) The term *stock appreciation rights (SARs)* refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the registrant or a named executive officer.

(ii) The term *plan* includes, but is not limited to, the following: any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, pursuant to which the following may be received: cash, stock, restricted stock or restricted stock units, phantom stock, stock options, SARs, stock options in tandem with SARs, warrants, convertible securities, performance units and performance shares, and similar instruments. A plan may be applicable to one person. Registrants may omit information regarding group life, health, hospitalization, medical reimbursement or relocation plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

(iii) The term *long-term incentive plan* means any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year, whether such performance is measured by reference to financial performance of the registrant or an affiliate, the registrant's stock price, or any other measure, but excluding restricted stock, stock option and SAR plans.

(7) Location of specified information. The information required by paragraph (h) of this item need not be provided in any filings other than a registrant proxy or information statement relating to an annual meeting of security holders at which directors are to be elected (or special meeting or written

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consents in lieu of such meeting). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

(b) *Summary compensation table*—(1) *General.* The information specified in

paragraph (b)(2) of this item, concerning the compensation of the named executive officers for each of the registrant's last three completed fiscal years, shall be provided in a Summary Compensation Table, in the tabular format specified below.

SUMMARY COMPENSATION TABLE

Name and principal position	Year	Annual compensation			Long term compensation			
		Salary (\$)	Bonus (\$)	Other annual compensation (\$)	Awards		Payouts	
					Restricted stock award(s) (\$)	Securities underlying options/SARs (#)	LTIP payouts (\$)	All other compensation (\$)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
CEO	—							
	—							
A	—							
	—							
B	—							
	—							
C	—							
	—							
D	—							
	—							

(2) The Table shall include: (i) The name and principal position of the executive officer (column (a));

(ii) Fiscal year covered (column (b));

(iii) Annual compensation (columns (c), (d) and (e)), including:

(A) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(B) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d)); and

Instructions to Item 402(b)(2)(iii) (A) and (B): 1. Amounts deferred at the election of a named executive officer, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)], or otherwise, shall be included in the salary column (column (c)) or bonus column (column (d)), as appropriate, for the fiscal year in which earned. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, that fact must be disclosed in a footnote and such

amount must be disclosed in the subsequent fiscal year in the appropriate column for the fiscal year in which earned.

2. For stock or any other form of non-cash compensation, disclose the fair market value at the time the compensation is awarded, earned or paid.

3. Registrants need not include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer pursuant to a registrant program under which stock, stock-based or other forms of non-cash compensation may be received by a named executive in lieu of a portion of annual compensation earned in a covered fiscal year. However, the receipt of any such form of non-cash compensation in lieu of salary or bonus earned for a covered fiscal year must be disclosed in the appropriate column of the Table corresponding to that fiscal year (i.e., restricted stock awards (column (f)); options or SARs (column (g)); all other compensation (column (i)), or, if made pursuant to a long-term incentive plan and therefore not reportable at grant in the Summary Compensation Table, a footnote must be added to the salary or bonus column

so disclosing and referring to the Long-Term Incentive Plan Table (required by paragraph (e) of this item) where the award is reported.

(C) The dollar value of other annual compensation not properly categorized as salary or bonus, as follows (column (e)):

(1) Perquisites and other personal benefits, securities or property, unless the aggregate amount of such compensation is the lesser of either \$50,000 or 10% of the total of annual salary and bonus reported for the named executive officer in columns (c) and (d);

(2) Above-market or preferential earnings on restricted stock, options, SARs or deferred compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(3) Earnings on long-term incentive plan compensation paid during the fiscal year or payable during that period but deferred at the election of the named executive officer;

(4) Amounts reimbursed during the fiscal year for the payment of taxes; and

(5) The dollar value of the difference between the price paid by a named executive officer for any security of the registrant or its subsidiaries purchased from the registrant or its subsidiaries (through deferral of salary or bonus, or otherwise), and the fair market value of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the registrant.

Instructions to Item 402(b)(2)(iii)(C): 1. Each perquisite or other personal benefit exceeding 25% of the total perquisites and other personal benefits reported for a named executive officer must be identified by type and amount in a footnote or accompanying narrative discussion to column (e).

2. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the registrant and its subsidiaries.

3. Interest on deferred or long-term compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, [26 U.S.C. 1274(d)]) at the rate that corresponds most closely to the rate under the registrant's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest

rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate.

4. Dividends (and dividend equivalents) on restricted stock, options, SARs or deferred compensation denominated in stock ("deferred stock") are preferential only if earned at a rate higher than dividends on the registrant's common stock. Only the preferential portion of the dividends or equivalents must be included.

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) The dollar value (net of any consideration paid by the named executive officer) of any award of restricted stock, including share units (calculated by multiplying the closing market price of the registrant's unrestricted stock on the date of grant by the number of shares awarded) (column (f));

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of free-standing SARs (column (g)); and

(C) The dollar value of all payouts pursuant to long-term incentive plans ("LTIPs") as defined in paragraph (a)(6)(iii) of this item (column (h)).

Instructions to Item 402(b)(2)(iv): 1. Awards of restricted stock that are subject to performance-based conditions to vesting, in addition to lapse of time and/or continued service with the registrant or a subsidiary, may be reported as LTIP awards pursuant to paragraph (e) of this item instead of in column (f). If this approach is selected, once the restricted stock vests, it must be reported as an LTIP payout in column (h).

2. The registrant shall, in a footnote to the Summary Compensation Table (appended to column (f), if included), disclose:

a. The number and value of the aggregate restricted stock holdings at the end of the last completed fiscal year. The value shall be calculated in the manner specified in paragraph (b)(2)(iv)(A) of this item using the value of the registrant's shares at the end of the last completed fiscal year;

b. For any restricted stock award reported in the Summary Compensation Table that will vest, in whole or in part, in under three

years from the date of grant, the total number of shares awarded and the vesting schedule; and

c. Whether dividends will be paid on the restricted stock reported in column (f).

3. If at any time during the last completed fiscal year, the registrant has adjusted or amended the exercise price of stock options or freestanding SARs previously awarded to a named executive officer, whether through amendment, cancellation or replacement grants, or any other means ("repriced"), the registrant shall include the number of options or freestanding SARs so repriced as Stock Options/SARs granted and required to be reported in column (g).

4. If any specified performance target, goal or condition to payout was waived with respect to any amount included in LTIP payouts reported in column (h), the registrant shall so state in a footnote to column (h).

(v) All other compensation for the covered fiscal year that the registrant could not properly report in any other column of the Summary Compensation Table (column (i)). Any compensation reported in this column for the last completed fiscal year shall be identified and quantified in a footnote. Such compensation shall include, but not be limited to:

(A) The amount paid, payable or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries; or

(2) A change in control of the registrant or a change in the executive officer's responsibilities following such a change in control.

(B) The dollar value of above-market or preferential amounts earned on restricted stock, options, SARs or deferred compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid during the period, or payable during the period but deferred at the election of a named executive officer, this information shall be reported as Other Annual Compensation in column (e). See Instructions 3 and 4 to paragraph 402(b) (2) (iii) (C) of this item;

(C) The dollar value of amounts earned on long-term incentive plan compensation during the fiscal year, or calculated with respect to that period, except that if such amounts are paid

during that period, or payable during that period at the election of the named executive officer, this information shall be reported as Other Annual Compensation in column (e);

(D) Annual registrant contributions or other allocations to vested and unvested defined contribution plans; and

(E) The dollar value of any insurance premiums paid by, or on behalf of, the registrant during the covered fiscal year with respect to term life insurance for the benefit of a named executive officer, and, if there is any arrangement or understanding, whether formal or informal, that such executive officer has or will receive or be allocated an interest in any cash surrender value under the insurance policy, either:

(1) The full dollar value of the remainder of the premiums paid by, or on behalf of, the registrant; or

(2) If the premiums will be refunded to the registrant on termination of the policy, the dollar value of the benefit to the executive officer of the remainder of the premium paid by, or on behalf of, the registrant during the fiscal year. The benefit shall be determined for the period, projected on an actuarial basis, between payment of the premium and the refund.

Instructions to Item 402(b)(2)(v): 1. LTIP awards and amounts received on exercise of options and SARs need not be reported as All Other Compensation in column (i).

2. Information relating to defined benefit and actuarial plans need not be reported.

3. Where alternative methods of reporting are available under paragraph (b) (2) (v) (E) of this item, the same method should be used for each of the named executive officers. If the registrant chooses to change methods from one year to the next, that fact, and the reason therefor, should be disclosed in a footnote to column (i).

Instruction to Item 402(b): Information with respect to fiscal years prior to the last completed fiscal year will not be required if the registrant was not a reporting company pursuant to Section 13(a) or 15(d) of the Exchange Act at any time during that year, except that the registrant will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

(c) *Option/SAR grants table.* (1) The information specified in paragraph (c)(2)

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of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred)

made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified as follows:

OPTION/SAR GRANTS IN LAST FISCAL YEAR
[Individual Grants]

Name	Number of securities underlying options/SARs granted (#)	Percent of total options/SARs granted to employees in fiscal year	Exercise or base price (\$/Sh)	Expiration date
(a)	(b)	(c)	(d)	(e)
CEO				
A				
B				
C				
D				

(2) The Table shall include, with respect to each grant:

- (i) The name of the executive officer (column (a));
- (ii) number of securities underlying option/SARs granted (column (b)).
- (iii) The percent the grant represents of total options and SARs granted to employees during the fiscal year (column (c));
- (iv) The per-share exercise or base price of the options or SARs granted (column (d)). If such exercise or base price is less than the market price of the underlying security on the date of grant, a separate, adjoining column shall be added showing market price on the date of grant; and
- (v) The expiration date of the options or SARs (column (e)).

Instructions to Item 402(c): 1. If more than one grant of options and/or freestanding SARs was made to a named executive officer during the last completed fiscal year, a separate line should be used to provide disclosure of each such grant. However, multiple grants during a single fiscal year may be aggregated where each grant was made at the same exercise and/or base price and has the same expiration date, and the same performance vesting thresholds, if any. A single grant consisting of options and/or freestanding SARs shall be reported as separate grants with respect to each tranche with a different exercise and/or base price, performance vesting threshold, or expiration date.

2. Options or freestanding SARs granted in connection with an option repricing transaction shall be reported in this table. See In-

struction 3 to paragraph (b)(2)(iv) of this item.

3. Any material term of the grant, including but not limited to the date of exercisability, the number of SARs, performance units or other instruments granted in tandem with options, a performance-based condition to exercisability, a reload feature, or a tax-reimbursement feature, shall be footnoted.

4. If the exercise or base price is adjustable over the term of any option or freestanding SAR in accordance with any prescribed standard or formula, including but not limited to an index or premium price provision, describe the following, either by footnote to column (c) or in narrative accompanying the Table:

- (a) The standard or formula; and
- (b) Any constant assumption made by the registrant regarding any adjustment to the exercise price in calculating the potential option or SAR value.

5. If any provision of a grant (other than an antidilution provision) could cause the exercise price to be lowered, registrants must clearly and fully disclose these provisions and their potential consequences either by a footnote or accompanying textual narrative.

6. In determining the grant-date market or base price of the security underlying options or freestanding SARs, the registrant may use either the closing market price per share of the security, or any other formula prescribed for the security.

(d) *Aggregated option/SAR exercises and fiscal year-end option/SAR Value Table.*

(1) The information specified in paragraph (d)(2) of this item, concerning each exercise of stock options (or tandem SARs) and freestanding SARs during the last completed fiscal year by

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each of the named executive officers and the fiscal year-end value of unexercised options and SARs, shall be provided on an aggregated basis in the tabular format specified below:

AGGREGATED OPTION/SAR EXERCISES IN LAST FISCAL YEAR AND FY-END OPTION/SAR VALUES

Name	Shares acquired on exercise (#)	Value realized (\$)	Number of securities underlying unexercised options/SARs at FY-end (#) Exercisable/Unexercisable	Value of unexercised in-the-money options/SARs at FY-end (\$) Exercisable/Unexercisable
(a)	(b)	(c)	(d)	(e)
CEO				
A				
B				
C				
D				

(2) The table shall include:

(i) The name of the executive officer (column (a));

(ii) The number of shares received upon exercise, or, if no shares were received, the number of securities with respect to which the options or SARs were exercised (column (b));

(iii) The aggregate dollar value realized upon exercise (column (c));

(iv) The total number of securities underlying unexercised options and SARs held at the end of the last completed fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (d)); and

(v) The aggregate dollar value of in-the-money, unexercised options and SARs held at the end of the fiscal year, separately identifying the exercisable and unexercisable options and SARs (column (e)).

Instructions to Item 402(d)(2): 1. Options or freestanding SARs are in-the-money if the fair market value of the underlying securities exceeds the exercise or base price of the

option or SAR. The dollar values in columns (c) and (e) are calculated by determining the difference between the fair market value of the securities underlying the options or SARs and the exercise or base price of the options or SARs at exercise or fiscal year-end, respectively.

2. In calculating the dollar value realized upon exercise (column (c)), the value of any related payment or other consideration provided (or to be provided) by the registrant to or on behalf of a named executive officer, whether in payment of the exercise price or related taxes, shall not be included. Payments by the registrant in reimbursement of tax obligations incurred by a named executive officer are required to be disclosed in accordance with paragraph (b)(2)(iii)(C)(4) of this item.

(e) *Long-Term Incentive Plan ("LTIP") awards table.* (1) The information specified in paragraph (e)(2) of this item, regarding each award made to a named executive officer in the last completed fiscal year under any LTIP, shall be provided in the tabular format specified below:

LONG-TERM INCENTIVE PLANS—AWARDS IN LAST FISCAL YEAR

(a) Name	(b) Number of shares, units or other rights (#)	(c) Performance or other period until maturation or payout	Estimated Future Payouts under Non-Stock Price-Based Plans		
			(d) Threshold (\$ or #)	(e) Target (\$ or #)	(f) Maximum (\$ or #)
CEO					
A					
B					
C					
D					

(2) The Table shall include: (i) The name of the executive officer (column (a));

(ii) The number of shares, units or other rights awarded under any LTIP, and, if applicable, the number of shares underlying any such unit or right (column (b));

(iii) The performance or other time period until payout or maturation of the award (column (c)); and

(iv) For plans not based on stock price, the dollar value of the estimated payout, the number of shares to be awarded as the payout or a range of estimated payouts denominated in dollars or number of shares under the award (threshold, target and maximum amount) (columns (d) through (f)).

Instructions to Item 402(e): 1. For purposes of this paragraph, the term "long-term incentive plan" or "LTIP" shall be defined in accordance with paragraph (a)(6)(iii) of this item.

2. Describe in a footnote or in narrative text accompanying this table the material terms of any award, including a general description of the formula or criteria to be applied in determining the amounts payable. Registrants are not required to disclose any factor, criterion or performance-related or other condition to payout or maturation of a particular award that involves confidential commercial or business information, disclosure of which would adversely affect the registrant's competitive position.

3. Separate disclosure shall be provided in the Table for each award made to a named executive officer, accompanied by the information specified in Instruction 2 to this paragraph. If awards are made to a named executive officer during the fiscal year under more than one plan, identify the particular plan under which each such award was made.

4. For column (d), "threshold" refers to the minimum amount payable for a certain level of performance under the plan. For column (e), "target" refers to the amount payable if the specified performance target(s) are reached. For column (f), "maximum" refers to the maximum payout possible under the plan.

5. In column (e), registrants must provide a representative amount based on the previous fiscal year's performance if the target award is not determinable.

6. A tandem grant of two instruments, only one of which is pursuant to a LTIP, need be reported only in the table applicable to the other instrument. For example, an option granted in tandem with a performance share would be reported only as an option grant, with the tandem feature noted.

(f) *Compensation of directors*—(1) *Standard arrangements.* Describe any standard arrangements, stating amounts, pursuant to which directors of the registrant are compensated for any services provided as a director, including any additional amounts payable for committee participation or special assignments.

(2) *Other arrangements.* Describe any other arrangements pursuant to which any director of the registrant was compensated during the registrant's last completed fiscal year for any service provided as a director, stating the amount paid and the name of the director.

Instruction to Item 402(f)(2): The information required by paragraph (f)(2) of this item shall include any arrangement, including consulting contracts, entered into in consideration of the director's service on the board. The material terms of any such arrangement shall be included.

(g) *Employment contracts and termination of employment and change-in-control arrangements.* Describe the terms and conditions of each of the following contracts or arrangements:

(1) Any employment contract between the registrant and a named executive officer; and

(2) Any compensatory plan or arrangement, including payments to be received from the registrant, with respect to a named executive officer, if such plan or arrangement results or will result from the resignation, retirement or any other termination of such executive officer's employment with the registrant and its subsidiaries or from a change-in-control of the registrant or a change in the named executive officer's responsibilities following a change-in-control and the amount involved, including all periodic payments or installments, exceeds \$100,000.

(h) *Report on repricing of options/SARs.*

(1) If at any time during the last completed fiscal year, the registrant, while a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act [15 U.S.C. 78m(a), 78o(d)], has adjusted or amended the exercise price of stock options or SARs previously awarded to any of the named executive officers, whether through amendment, cancellation or replacement grants, or any

other means ("repriced"), the registrant shall provide the information specified in paragraph (h)(2) of this item.

(2) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) shall explain in reasonable detail any such repricing of options and or SARs held by a named executive officer in the last completed fiscal year, as well as the basis for each such repricing.

Instructions to Item 402(h): 1. A replacement grant is any grant of options or SARs reasonably related to any prior or potential option or SAR cancellation, whether by an exchange of existing options or SARs for options or SARs with new terms; the grant of new options or SARs in tandem with previously granted options or SARs that will operate to cancel the previously granted options or SARs upon exercise; repricing of previously granted options or SARs; or otherwise. If a corresponding original grant was canceled in a prior year, information about such grant nevertheless must be disclosed pursuant to this paragraph.

2. If the replacement grant is not made at the current market price, describe the terms of the grant in a footnote or accompanying textual narrative.

3. This paragraph shall not apply to any repricing occurring through the operation of:

- a. A plan formula or mechanism that results in the periodic adjustment of the option or SAR exercise or base price;
- b. A plan antidilution provision; or
- c. A recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

[57 FR 48145, Oct. 21, 1992, as amended at 58 FR 63012, Nov. 29, 1993; 64 FR 11115, Mar. 8, 1999]

§ 228.403 (Item 403) Security Ownership of Certain Beneficial Owners and Management.

(a) *Security ownership of certain beneficial owners.* Complete the table below for any person (including any "group") who is known to the small business issuer to be the beneficial owner of more than five percent of any class of the small business issuer's voting securities.

Title of class	Name and address of beneficial owner	Amount and nature of beneficial owner	Percent of class
(1)	(2)	(3)	(4)

(b) *Security ownership of management.* Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in Item 402(a)(2) (§ 228.402(a)(2)), and directors and executive officers of the registrant as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares with respect to which such persons have the right to acquire beneficial ownership as specified in § 240.13d--3(d)(1) of this chapter.

Title of class	Name and address of beneficial owner	Amount and nature of beneficial owner	Percent of class
(1)	(2)	(3)	(4)

(c) *Changes in control.* Describe any arrangements which may result in a change in control of the small business issuer.

Instructions to Item 403: 1. Of the number of shares shown in column (3) of paragraphs (a) and (b) of this Item, state in a footnote the amount which the listed beneficial owner has the right to acquire within sixty days, from options, warrants, rights, conversion privilege or similar obligations.

2. Where persons hold more than 5% of a class under a voting trust or similar agreement, provide the following:

- (a) the title of such securities;
- (b) the amount that they hold under the trust or agreement (if not clear from the table);
- (c) the duration of the agreement;
- (d) the names and addresses of the voting trustees; and
- (e) a brief outline of the voting rights and other powers of the voting trustees under the trust or agreement.

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3. Calculate the percentages on the basis of the amount of outstanding securities plus, for each person or group, any securities that person or group has the right to acquire within 60 days pursuant to options, warrants, conversion privileges or other rights.

4. In this Item, a *beneficial owner* of a security means:

(a) Any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

(1) Voting power, which includes the power to vote, or to direct the voting of, such security; or

(2) Investment power, which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership.

5. All securities of the same class beneficially owned by a person, regardless of the form that such beneficial ownership takes, shall be totaled in calculating the number of shares beneficially owned by such person.

6. The small business issuer is responsible for knowing the contents of any statements filed with the Commission under section 13(d) or 13(g) of the Exchange Act concerning the beneficial ownership of securities and may rely upon the information in such statements unless it knows or has reason to believe that the information is not complete or accurate.

7. The term "group" means two or more persons acting as a partnership, syndicate, or other group for the purpose of acquiring, holding or disposing of securities of an issuer.

8. Where the small business issuer lists more than one beneficial owner for the same securities, adequate disclosure should be included to avoid confusion.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992]

§ 228.404 (Item 404) Certain Relationships and Related Transactions.

(a) Describe any transaction during the last two years, or proposed transactions, to which the small business issuer was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest. Give the name of the person, the relationship to the issuer, nature of the person's interest in the transaction and, the amount of such interest:

(1) Any director or executive officer of the small business issuer;

(2) Any nominee for election as a director;

(3) Any security holder named in response to Item 403 (§ 228.403); and

(4) Any member of the immediate family (including spouse, parents, children, siblings, and in-laws) of any of the persons in paragraphs (a) (1), (2) or (3) of this Item.

(b) No information need be included for any transaction where:

(1) Competitive bids determine the rates or charges involved in the transaction;

(2) The transaction involves services at rates or charges fixed by law or governmental authority;

(3) The transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(4) The amount involved in the transaction or a series of similar transactions does not exceed \$60,000; or

(5) The interest of the person arises solely from the ownership of securities of the small business issuer and the person receives no extra or special benefit that was not shared equally (pro rata) by all holders of securities of the class.

(c) List all parents of the small business issuer showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent if any.

(d) *Transactions with promoters.* Issuers organized within the past five years shall:

(1) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter, directly or indirectly, from the issuer and the nature and amount of any assets, services or other consideration therefore received or to be received by the registrant; and

(2) As to any assets acquired or to be acquired from a promoter, state the amount at which the assets were acquired or are to be acquired and the principle followed or to be followed in determining such amount and identify the persons making the determination

and their relationship, if any, with the registrant or any promoter. If the assets were acquired by the promoter within two years prior to their transfer to the issuer, also state the cost thereof to the promoter.

Instructions to Item 404: 1. A person does not have a material indirect interest in a transaction within the meaning of this Item where:

(a) The interest arises only:
(1) from such person's position as a director of another corporation or organization (other than a partnership) which is a party to the transaction and/or

(2) from the total ownership (direct or indirect) by all specified persons of less than a 10% equity interest in another person (other than a partnership) which is a party to the transaction;

(b) The interest arises only from such person's position as a limited partner in a partnership in which he and all other specified persons had an interest of less than 10 percent; or

(c) The interest of such person arises solely from holding an equity interest (but not a general partnership interest) or a creditor interest in another person that is a party to the transaction and the transaction is not material to such other person.

2. Include information for any material underwriting discounts and commissions upon the sale of securities by the small business issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principle underwriter.

3. As to any transaction involving the purchase or sale of assets by or to the small business issuer otherwise than in the ordinary course of business, state the cost of the assets to the purchase and if acquired by the seller within two years before the transaction, the cost thereof to the seller.

§ 228.405 (Item 405) Compliance With Section 16(a) of the Exchange Act.

Every small business issuer that has a class of equity securities registered pursuant to Section 12 of the Exchange Act (15 U.S.C. 78j) shall:

(a) Based solely upon a review of Forms 3 and 4 (17 CFR 249.103 and 249.104 of this chapter) and amendments thereto furnished to the registrant under Rule 16a-3(e) (17 CFR 240.16a-3(e) of this chapter) during its most recent fiscal year and Forms 5 and amendments thereto (§249.105 of this chapter) furnished to the registrant with respect to its most recent fiscal year, and any written representa-

tion referred to in paragraph (b)(2)(i) of this Item:

(1) Under the caption "Section 16(a) Beneficial Ownership Reporting Compliance," identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to section 12 ("reporting person") that failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(2)(i) of this section, unless the registrant otherwise knows that no Form 5 is required.

NOTE: The disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item for the most recent fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this Item:

(1) A form received by the registrant within three calendar days of the required filing date may be presumed to have been filed with the Commission by the required filing date.

(2) If the registrant:

(i) receives a written representation from the reporting person that no Form 5 is required; and

(ii) maintains the representation for two years, making a copy available to the Commission or its staff upon request, the registrant need not identify

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such reporting person pursuant to paragraph (a) of this Item as having failed to file a Form 5 with respect to that fiscal year.

[57 FR 36449, Aug. 13, 1992, as amended at 61 FR 30391, June 14, 1996]

§ 228.406 (Item 406) Code of ethics.

(a) Disclose whether the small business issuer has adopted a code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the small business issuer has not adopted such a code of ethics, explain why it has not done so.

(b) For purposes of this Item 406, the term *code of ethics* means written standards that are reasonably designed to deter wrongdoing and to promote:

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a small business issuer files with, or submits to, the Commission and in other public communications made by the small business issuer;

(3) Compliance with applicable governmental laws, rules and regulations;

(4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

(5) Accountability for adherence to the code.

(c) The small business issuer must:

(1) File with the Commission a copy of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, as an exhibit to its annual report;

(2) Post the text of such code of ethics on its Internet website and disclose, in its annual report, its Internet address and the fact that it has posted such code of ethics on its Internet website; or

(3) Undertake in its annual report filed with the Commission to provide

to any person without charge, upon request, a copy of such code of ethics and explain the manner in which such request may be made.

(d) If the small business issuer intends to satisfy the disclosure requirement under Item 10 of Form 8-K regarding an amendment to, or a waiver from, a provision of its code of ethics that applies to the small business issuer's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in paragraph (b) of this Item by posting such information on its Internet website, disclose the small business issuer's Internet address and such intention.

Instructions to Item 406. 1. A small business issuer may have separate codes of ethics for different types of officers. Furthermore, a *code of ethics* within the meaning of paragraph (b) of this Item may be a portion of a broader document that addresses additional topics or that applies to more persons than those specified in paragraph (a). In satisfying the requirements of paragraph (c), a small business issuer need only file, post or provide the portions of a broader document that constitutes a *code of ethics* as defined in paragraph (b) and that apply to the persons specified in paragraph (a).

2. If a small business issuer elects to satisfy paragraph (c) of this Item by posting its code of ethics on its website pursuant to paragraph (c)(2), the code of ethics must remain accessible on its website for as long as the small business issuer remains subject to the requirements of this Item and chooses to comply with this Item by posting its code on its Web site pursuant to paragraph (c)(2).

3. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a-14(g) and § 240.15d-14(g) of this chapter) is not required to disclose the information required by this Item.

[68 FR 5126, Jan. 31, 2003]

§ 228.501 (Item 501) Front of registration statement and front cover of prospectus.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) Limit the outside front cover page of the prospectus to one page and include the following information:

(1) The registrant's name. A foreign registrant also must give the English translation of its name;

(2) The title, amount, and description of securities offered. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement;

(3) If there are selling security holders, a statement to that effect;

(4) Whether any national securities exchange or the Nasdaq Stock Market lists the securities offered, naming the particular market(s), and identifying the trading symbol(s) for those securities;

(5) A cross-reference to the risk factors section, including the page number where it appears in the prospectus. Highlight this cross-reference by prominent type or in another manner;

(6) Any legend or statement required by the law of any state in which the securities are offered;

(7) A legend that indicates that neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed on the adequacy or accuracy of the disclosures in the prospectus. Also make clear that any representation to the contrary is a criminal offense. You may use one of the following or other clear, plain language:

Example A: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of the prospectus. Any representation to the contrary is a criminal offense.

Example B: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(8) If you are not a reporting company and the preliminary prospectus will be circulated, as applicable:

(i) A bona fide estimate of the range of the maximum offering price and

maximum number of shares or units offered; or

(ii) A bona fide estimate of the principal amount of debt securities offered;

(9)(i) Name(s) of the lead or managing underwriter(s) and an identification of the nature of the underwriting arrangements;

(ii) If the offering is not made on a firm commitment basis, a brief description of the underwriting arrangements;

(iii) If you offer the securities on a best efforts or best efforts minimum/maximum basis, the date the offering will end, any minimum purchase requirements, and whether or not there are any arrangements to place the funds in an escrow, trust, or similar account; and

(iv) If you offer the securities for cash, the price to the public for the securities, the underwriting discounts and commissions, and proceeds to the registrant or other persons. Show the information on both a per share or unit basis and for the total amount of the offering. If you make the offering on a minimum/maximum basis, show this information based on the total minimum and total maximum amount of the offering. You may present the information in a table, term sheet format, or other clear presentation. You may present the information in any format that fits the design of the cover page so long as the information can be easily read and is not misleading;

(10) If the prospectus will be used before the effective date of the registration statement, a prominent statement that:

(i) The information in the prospectus will be amended or completed;

(ii) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(iii) The securities may not be sold until the registration statement becomes effective; and

(iv) The prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted. You may use the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the

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registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(11) If you use § 230.430A of this chapter to omit pricing information and the prospectus is used before you determine the public offering price, the information in paragraph (a)(10) of this section; and

(12) The date of the prospectus.

(b) [Reserved]

[63 FR 6379, Feb. 6, 1998]

§ 228.502 (Item 502) Inside front and outside back cover pages of prospectus.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Table of contents.* On either the inside front or outside back cover page of the prospectus, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include a specific listing of the risk factors section required by Item 503 of this Regulation S-B (17 CFR 228.503). You must include the table of contents immediately following the cover page in any prospectus you deliver electronically;

(b) *Dealer prospectus delivery obligation.* If applicable to your offering, on the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Securities Act (15 U.S.C. 77d(3)) and § 230.174 of this chapter. You may use the following or other clear, plain language:

DEALER PROSPECTUS DELIVERY OBLIGATION

Until (insert date), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

[63 FR 6380, Feb. 6, 1998]

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§ 228.503 (Item 503) Summary information and risk factors.

The small business issuer must furnish the following information in plain English. See § 230.421(d) of Regulation C of this chapter.

(a) *Summary.* Provide a summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful. The summary should be brief. The summary should not contain, and is not required to contain, all of the detailed information in the prospectus. If you provide summary business or financial information, even if you do not caption it as a summary, you still must provide that information in plain English.

Instruction to paragraph 503(a): The summary should not merely repeat the text of the prospectus but should provide a brief overview of the key aspects of the offering. Carefully consider and identify those aspects of the offering that are the most significant and determine how best to highlight those points in clear, plain language.

(b) *Address and phone number.* Include, either on the cover page or in the summary section of the prospectus, the complete mailing address and telephone number of your principal executive offices.

(c) *Risk factors.* (1) Discuss in a section captioned "Risk Factors" any factors that make the offering speculative or risky. The factors may include, among other things, the following:

(i) Your lack of an operating history;

(ii) Your lack of recent profits from operations;

(iii) Your poor financial position;

(iv) Your business or proposed business; or

(v) The lack of a market for your common equity securities.

(2) The risk factor discussion must immediately follow the summary section. If you do not include a summary section, the risk factor discussion must immediately follow the cover page or the pricing information that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on § 230.430A(a) of this chapter.

[63 FR 6380, Feb. 6, 1998]

§ 228.504 (Item 504) Use of Proceeds.

State how the net proceeds of the offering will be used, indicating the amount to be used for each purpose and the priority of each purpose, if all of the securities are not sold. If all or a substantial part of the proceeds are not allocated for a specific purpose, so state and discuss the principal reasons for the offering.

Instructions to Item 504: 1. If a material amount of proceeds will discharge debt, state the interest rate and maturity. If that debt was incurred within one year, describe the use of the proceeds of that debt other than short-term borrowings used for working capital.

2. If any material amount of the proceeds is to be used to acquire assets or finance the acquisitions of other businesses, describe the assets or businesses and identify the persons from whom they will be bought. State the cost of the assets and, where such assets are to be acquired from affiliates of the small business issuer or their associates, give the names of the persons from whom they are to be acquired and set forth the principle followed in determining the cost to the small business issuer.

§ 228.505 (Item 505) Determination of Offering Price.

(a) If there is no established public market for the common equity being registered or if there is a significant difference between the offering price and the market price of the stock, give the factors that were considered in determining the offering price.

(b) If warrants, rights and convertible securities are being registered and there is no public market for the underlying securities, describe the factors considered in determining the exercise or conversion price.

§ 228.506 (Item 506) Dilution.

(a) If the small business issuer is not a reporting company and is selling common equity at a price significantly more than the price paid by officers, directors, promoters and affiliated persons for common equity purchased by them during the past five years (or which they have rights to purchase), compare these prices.

(b) If paragraph (a) of this Item applies and the issuer had losses in each of its last three fiscal years, or since its inception, whichever period is

shorter, and there is a material dilution of the purchasers' equity interest, disclose the following:

(1) The net tangible book value per share before and after the distribution;

(2) The amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and

(3) The amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

§ 228.507 (Item 507) Selling Security Holders.

If security holders of a small business issuer is offering securities, name each selling security holder, state any position, office, or other material relationship which the selling security holder has had within the past three years with the small business issuer or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder before the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after the offering is complete.

Instruction: Responses to this item may be combined with disclosure in response to Item 403.

§ 228.508 (Item 508) Plan of Distribution.

(a) *Underwriters and underwriting obligations.* If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the small business issuer and state the nature of the relationship. State the nature of the obligation of the underwriter(s) to take the securities, *i.e.*, firm commitment, best efforts. The small business issuer must disclose the offering expenses specified in Item 511 of this Regulation S-B (17 CFR 228.511). If there is an arrangement under which the underwriter may purchase additional shares in connection with the offering, such as an over-allotment option, describe that arrangement and disclose

information on the total offering price, underwriting discounts and commissions, and total proceeds assuming the underwriter purchases all of the shares subject to that arrangement.

(b) *New underwriters.* Describe the business experience of managing or principal underwriters that have been in business less than three years, state their principal business function and identify any material relationships between the promoters of the issuer and the underwriter(s). This information need not be given if:

(1) The issuer is a reporting company; and

(2) An offering has no material risks.

(c) *Other distributions.* Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.

(d) *Underwriter's representative on the board of directors.* Describe any arrangement whereby the underwriter has the right to designate or nominate a member or members of the board of directors of the small business issuer. Identify any director so designated or nominated and indicate any relationship with the small business issuer.

(e) *Indemnification of underwriters.* If the underwriting agreement provides for indemnification by the small business issuer of the underwriters or their controlling persons against any liability arising under the Securities Act, furnish a brief description of such indemnification provisions.

(f) *Dealers' compensation.* State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other considerations to be received by any dealer in connection with the sale of the securities.

(g) *Finders.* Identify any finder and describe the nature of any material relationship between such finder and the small business issuer or associates or affiliates of the small business issuer.

(h) *Discretionary accounts.* If the small business issuer is not a reporting company, identify any principal underwriter that intends to sell to any discretionary accounts and include an estimate of the amount of securities so intended to be sold. The response to this paragraph shall be contained in a

pre-effective amendment which shall be circulated if the information is not available when the registration statement is filed.

(i) *Passive market making.* If the underwriters or any selling group members intend to engage in passive market making transactions as permitted by Rule 103 of Regulation M (§ 242.103 of this chapter), indicate such intention and briefly describe passive market making.

(j) *Stabilization and other transactions.*

(1) Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought, and the period within which they were bought. If you use § 230.430A of this chapter, the final prospectus must contain information on the stabilizing transactions that took place before the public offering price was set; and

(3) If you are making a warrant or rights offering of securities to existing security holders and the securities not purchased by existing security holders are to be reoffered to the public, disclose the following information in the reoffer prospectus:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

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(iii) The amount of the offered securities purchased by the underwriter during the offering period;

(iv) The amount of the offered securities sold by the underwriter during the offering period and the price or range of prices at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the offering price.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 19605, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6380, Feb. 6, 1998]

§ 228.509 (Item 509) Interest of Named Experts and Counsel.

If an “expert” or “counsel” was hired on a contingent basis, will receive a direct or indirect interest in the small business issuer or was a promoter, underwriter, voting trustee, director, officer, or employee, of the small business issuer, describe the contingent basis, interest, or connection.

(a) *Expert*—is a person who is named as preparing or certifying all or part of the small business issuer’s registration statement or a report or valuation for use in connection with the registration statement.

(b) *Counsel*—is counsel named in the prospectus as having given an opinion on the validity of the securities being registered or upon other legal matters concerning the registration or offering of the securities.

Instruction to Item 509: 1. The small business issuer does not need to disclose the interest of an expert (other than an accountant) or counsel if their interest (including the fair market value of all securities of the small business issuer received and to be received, or subject to options, warrants or rights received or to be received) does not exceed \$50,000.

§ 228.510 (Item 510) Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Describe the indemnification provisions for directors, officers and controlling persons of the small business issuer against liability under the Securities Act. This includes any provision in the underwriting agreement which indemnifies the underwriter or its controlling persons against such liabilities where a director, officer or controlling

person of the small business issuer is such an underwriter or controlling person or a member of any firm which is such an underwriter. In addition, provide the undertaking in the first sentence of Item 512(e).

§ 228.511 (Item 511) Other Expenses of Issuance and Distribution.

(a) Give an itemized statement of all expenses of the offering, other than underwriting discounts and commissions. If any of the securities are registered for sale by security holders, state how much of the expenses the security holders will pay.

(1) The itemized list should generally include registration fees, federal taxes, state taxes and fees, trustees’ and transfer agents’ fees, costs of printing and engraving, legal, accounting, and engineering fees and any listing fees.

(2) Include as a separate item any premium paid by the small business issuer or any selling security holder on any policy to insure or indemnify directors or officers against any liabilities they may incur in the registration, offering, or sale of these securities.

(b) [Reserved]

Instruction to Item 511: 1. If the amounts of any items are not known, give estimates but identify them as such.

§ 228.512 (Item 512) Undertakings.

Include each of the following undertakings that apply to the offering.

(a) *Rule 415 Offering.* If the small business issuer is registering securities under Rule 415 of the Securities Act (§230.415 of this chapter), that the small business issuer will:

(1) File, during any period in which it offers or sells securities, a post-effective amendment to this registration statement to:

(i) Include any prospectus required by section 10(a)(3) of the Securities Act;

(ii) Reflect in the prospectus any facts or events which, individually or together, represent a fundamental change in the information in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered

would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement; and

(iii) Include any additional or changed material information on the plan of distribution.

NOTE: Small business issuers do not need to give the statements in paragraphs (a)(1)(i) and (a)(1)(ii) of this Item if the registration statement is on Form S-3 or S-8 (§§239.13 or 239.16b of this chapter), and the information required in a post-effective amendment is incorporated by reference from periodic reports filed by the small business issuer under the Exchange Act.

(2) For determining liability under the Securities Act, treat each post-effective amendment as a new registration statement of the securities offered, and the offering of the securities at that time to be the initial bona fide offering.

(3) File a post-effective amendment to remove from registration any of the securities that remain unsold at the end of the offering.

(b) *Warrants and rights offerings.* If the small business issuer will offer the securities to existing security holders under warrants or rights and the small business issuer will reoffer to the public any securities not taken by security holders, with any modifications that suit the particular case—The small business issuer will supplement the prospectus, after the end of the subscription period, to include the results of the subscription offer, the transactions by the underwriters during the subscription period, the amount of unsubscribed securities that the underwriters will purchase and the terms of any later reoffering. If the underwriters make any public offering of the securities on terms different from those on the cover page of the prospectus, the small business issuer will file a post-effective amendment to state the terms of such offering.

(c) *Competitive bids.* If the small business issuer is offering securities at competitive bidding, with modifications to suit the particular case, the small business issuer will:

(1) Use its best efforts to distribute before the opening of bids, to prospective bidders, underwriters, and dealers, a reasonable number of copies of a prospectus that meet the requirements of section 10(a) of the Securities Act, and relating to the securities offered at competitive bidding, as contained in the registration statement, together with any supplements; and

(2) File an amendment to the registration statement reflecting the results of bidding, the terms of the re-offering and related matters where required by the applicable form, not later than the first use, authorized by the issuer after the opening of bids, of a prospectus relating to the securities offered at competitive bidding, unless the issuer proposes no further public offering of such securities by the issuer or by the purchasers.

(d) *Equity offerings of nonreporting small business issuers.* If a small business issuer that before the offering had no duty to file reports with the Commission under section 13(a) or 15(d) of the Exchange Act is registering equity securities for sale in an underwritten offering—The small business issuer will provide to the underwriter at the closing specified in the underwriting agreement certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(e) *Request for acceleration of effective date.* If the small business issuer will request acceleration of the effective date of the registration statement under Rule 461 under the Securities Act, include the following:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 (the "Act") may be permitted to directors, officers and controlling persons of the small business issuer pursuant to the foregoing provisions, or otherwise, the small business issuer has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable.

In the event that a claim for indemnification against such liabilities (other than the payment by the small business issuer of expenses incurred or paid by a director, officer or controlling person of the small business issuer in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the small business issuer will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

(f) If the issuer relies on Rule 430A under the Securities Act [§ 230.430A of this chapter], that the small business issuer will:

(1) For determining any liability under the Securities Act, treat the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the small business issuer under Rule 424(b)(1), or (4) or 497(h) under the Securities Act (§§ 230.424(b)(1), (4) or 230.497(h)) as part of this registration statement as of the time the Commission declared it effective.

(2) For determining any liability under the Securities Act, treat each post-effective amendment that contains a form of prospectus as a new registration statement for the securities offered in the registration statement, and that offering of the securities at that time as the initial bona fide offering of those securities.

[57 FR 36449, Aug. 13, 1992, as amended at 60 FR 26614, May 17, 1995]

§ 228.601 (Item 601) Exhibits.

(a) *Exhibits and index of exhibits.* (1) The exhibits required by the exhibit table generally must be filed or incorporated by reference.

(2) Each filing must have an index of exhibits. The exhibit index must list exhibits in the same order as the exhibit table. If the exhibits are incorporated by reference, this fact should be noted in the exhibit index. In the manually signed registration statement or report, the exhibit index should give the page number of each exhibit.

(3) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period covered by a Form 10-QSB or Form 10-KSB, it must be filed as an exhibit to the Form 10-QSB or Form 10-KSB filed for the same period. Any amendment or modification to a previously filed exhibit to a Form 10-SB, 10-KSB or 10-QSB document must be filed as an exhibit to a Form 10-QSB or 10-KSB. The amendment or modification does not need to be filed if the previously filed exhibit would not be currently required.

Instructions to Item 601(a): 1. If an exhibit (other than an opinion or consent) is filed in preliminary form and is later changed to include only interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters and the information appears elsewhere in the registration statement or a prospectus, no amendment need be filed.

2. Small business issuers may file copies of each exhibit, rather than originals, except as otherwise specifically noted.

3. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§ 232.201 and 232.202 of this chapter), the letter "P" (paper) should be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule (§ 228.601(a)(2)). Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§ 232.201 or § 232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation "CE" (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

EXHIBIT TABLE

	Securities Act forms					Exchange Act forms			
	SB-2	S-2	S-3	S-4 ³	S-8	10-SB	8-K	10-QSB	10-KSB
(1) Underwriting agreement	X	X	X	X			X		
(2) Plan of purchase, sale, reorganization, arrangement, liquidation or succession	X	X	X	X		X	X	X	X
(3) (i) Articles of Incorporation	X			X		X		X	X
(3) (ii) By-laws	X			X		X		X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X
(5) Opinion on legality	X	X	X	X	X				
(6) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion on tax matters	X	X	X	X					
(9) Voting trust agreement and amendments	X			X		X			X
(10) Material contracts	X	X		X		X		X	X
(11) Statement re: computation of per share earnings	X	X		X		X		X	X
(12) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(13) Annual report to security holders for the last fiscal year, Form 10-Q or 10-QSB or quarterly report to security holders ¹	X	X		X					X
(14) Code of ethics									X
(15) Letter on unaudited interim financial information	X	X	X	X	X		X	X	X
(16) Letter on change in certifying accountant ⁴	X	X		X		X	X		
(17) Letter on director resignation									
(18) Letter on change in accounting principles									X
(19) Reports furnished to security holders								X	
(20) Other documents or statements to security holders or any document incorporated by reference								X	X
(21) Subsidiaries of the small business issuer	X			X		X			X
(22) Published report regarding matters submitted to vote of security holders								X	X
(23) Consents of experts and counsel	X	X	X	X	X	X	X ²	X ²	X ²
(24) Power of attorney	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee									
(26) Invitations for competitive bids									
(27) through (30) [Reserved]									
(31) Rule 13a-14(a)/15d-14(a) Certifications								X	X
(32) Section 1350 Certifications								X	X
(33) through (98)[Reserved]									
(99) Additional exhibits	X	X	X	X	X	X	X	X	X

¹ Only if incorporated by reference into a prospectus and delivered to holders along with the prospectus as permitted by the registration statement; or in the case of a Form 10-KSB, where the annual report is incorporated by reference into the text of the Form 10-KSB.

² Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

³ An issuer need not provide an exhibit if: (1) an election was made under Form S-4 to provide S-2 or S-3 disclosure; and (2) the form selected (S-2 or S-3) would not require the company to provide the exhibit.

⁴ If required under Item 304 of Regulation S-B.

(b) *Description of exhibits.* Below is a description of each document listed in the exhibit table.

(1) *Underwriting agreement.* Each agreement with a principal underwriter for the distribution of the securities. If the terms have been determined and the securities are to be registered on Form S-3 (§239.13), the agreement may be filed on Form 8-K (§249.308) after the effectiveness of the registration statement.

(2) *Plan of purchase, sale, reorganization, arrangement, liquidation or succession.* Any such plan described in the filing. Schedules or attachments may be omitted if they are listed in the index and provided to the Commission upon request.

(3) *Articles of incorporation and by-laws.* (i) A complete copy of the articles of incorporation. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed.

(ii) A complete copy of the by-laws. Whenever amendments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including indentures.* (i) All instruments that define the rights of holders of the equity or debt securities that the issuer is registering, including the pages from the articles of incorporation or by-laws that define those rights.

(ii) All instruments defining the rights of holders of long term debt unless the total amount of debt covered by the instrument does not exceed 10% of the total assets of the small business issuer.

(iii) Copies of indentures to be qualified under the Trust Indenture Act of 1939 shall include an itemized table of contents and a cross reference sheet showing the location of the provisions inserted in accordance with Sections 310 through 318(a) of that Act.

Instruction to Item 601(b)(4)(iii) for electronic filings. If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S-T (§232.304 of this chapter).

(5) *Opinion on legality.* (i) An opinion of counsel on the legality of the securities being registered stating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the small business issuer.

(ii) If the securities being registered are issued under a plan that is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance with ERISA; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code.

If the plan is later amended, the small business issuer must have the opinion of counsel and the IRS determination letter updated to confirm compliance and qualification.

(6) No exhibit required.

(7) No exhibit required.

(8) *Opinion on tax matters.* If tax consequences of the transaction are material to an investor, an opinion of counsel, an independent public or certified public accountant or, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders. The exhibit is required for filings to which Securities Act Industry Guide 5 applies.

(9) *Voting trust agreement and amendments.*

(10) *Material contracts.* (i) Every material contract, not made in the ordinary course of business, that will be performed after the filing of the registration statement or report or was entered into not more than two years before such filing. Also include the following contracts:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the small business issuer's business is substantially dependent, such as contracts with principal customers, principal suppliers, franchise agreements, etc.;

(C) Any contract for the purchase or sale of any property, plant or equipment for a consideration exceeding 15 percent of such assets of the small business issuer; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the small business issuer.

(ii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the registrant as defined by Item 402(a)(2) (§ 228.402(a)(2)) participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the small business issuer) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a small business issuer in connection with a merger, consolidation or other acquisition transaction pursuant to which the small business issuer may make further grants or awards of its equity securities shall be considered a compensation plan of the small business issuer for purposes of the preceding sentence.

(C) The following management contracts or compensatory plans need not be filed:

(1) Ordinary purchase and sales agency agreements;

(2) Agreements with managers of stores in a chain organization or similar organization;

(3) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such;

(4) Any compensatory plan which is available to employees, officers or directors generally and provides for the same method of allocation of benefits between management and nonmanagement participants; and

(5) Any compensatory plan if the issuer is a wholly owned subsidiary of a reporting company and is filing a report on Form 10-KSB (§ 249.310b), or registering debt or non-voting preferred stock on Form S-2 (§ 239.12).

Instruction 1 to Item 601(b)(10): Only copies of the various remunerative plans need be filed. Each individual director's or executive officer's personal agreement under the plans need not be filed, unless they contain material provisions.

Instruction 2 to Item 601(b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10-QSB or Form 10-KSB, it shall be filed as an exhibit to the Form 10-QSB or Form 10-KSB filed for the corresponding period. See paragraph (a)(3) of this Item. With respect to quarterly reports on Form 10-QSB, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re: computation of per share earnings.* An explanation of the computation of per share earnings on both a primary and fully diluted basis unless the computation can be clearly determined from the registration statement or report.

(12) No exhibit required.

(13)(i) Annual report to security holders for the last fiscal year, Form 10-Q or 10-QSB or quarterly report to security holders, if incorporated by reference in the filing. Such reports, except for the parts which are expressly incorporated by reference in the filing are not deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411(b) of this chapter).

(ii) If the annual or quarterly report to security holders is incorporated by reference in whole or in part into an electronic filing, whatever is so incorporated must be filed in electronic format as an exhibit to the filing.

(14) *Code of ethics.* Any code of ethics, or amendment thereto, that is the subject of the disclosure required by Item 406 of Regulation S-B (§228.406) or Item 10 of Form 8-K (§249.308 of this chapter), to the extent that the small business issuer intends to satisfy the Item 406 or Item 10 requirements through filing of an exhibit.

(15) *Letter on unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information. The letter is not considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Securities Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10-QSB (§249.308b) which is incorporated by reference into the registration statement.

(16) *Letter on change in certifying accountant.* File the letter required by Item 304(a)(3).

(17) *Letter on director resignation.* Any letter from a former director which describes a disagreement with the small business issuer that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter on change in accounting principles.* Unless previously filed, a letter from the issuer's accountant stating whether any change in accounting principles or practices followed by the issuer, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is expected to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders.* If the issuer makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10-Q or 10-QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10-Q or 10-QSB report.

(20) Other documents or statements to security holders or any document incorporated by reference.

(21) *Subsidiaries of the small business issuer.* A list of all subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business.

(22) *Published report regarding matters submitted to vote of security holders.* Published reports containing all of the information called for by Item 4 of Part II of Form 10-Q (or 10-QSB) or Item 4 of Part I of Form 10-K or 10-KSB which is referred to therein in lieu of providing disclosure in Form 10-Q (10-QSB) or 10-K (10-KSB), which are required to be filed as exhibits by Rule 12b-23(a)(3) under the Exchange Act.

(23) *Consents of experts and counsel.* (i) Securities Act filings—Dated and manually signed written consents or a reference in the index to the location of the consent.

(ii) Exchange Act reports. If required to file a consent for material incorporated by reference in a previously filed registration statement under the Securities Act, the dated and manually signed consent to the material incorporated by reference. The consents shall be dated and manually signed.

(24) *Power of attorney.* If a person signs a registration statement or report under a power of attorney, a manually signed copy of such power of attorney or if located elsewhere in the registration statement, a reference in the index to where it is located. In addition, if an officer signs a registration statement for the small business issuer by a power of attorney, a certified copy of a resolution of the board of directors authorizing such signature. A power of

attorney that is filed with the Commission must relate to a specific filing or an amendment, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§ 230.462(b) of this chapter. A power of attorney that confers general authority must not be filed with the Commission.

(25) *Statement of eligibility of trustee.*

(i) Form T-1 (§ 269.1 of this chapter) if an indenture is being qualified under the Trust Indenture Act, bound separately from the other exhibits.

(ii) The requirement to bind separately the statement of eligibility and qualification does not apply to statements submitted in electronic format. Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by § 260.5b-1 through § 260.5b-3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities that the small business issuer is offering at competitive bidding, any invitation for competitive bid that the small business issuer will send or give to any person shall be filed.

(27)-(30) [Reserved]

(31) *Rule 13a-14(a)/15d-14(a) Certifications.* The certifications required by Rule 13a-14(a) (17 CFR 240.13a-14(a)) or Rule 15d-14(a) (17 CFR 240.15d-14(a)) exactly as set forth below:

*Certifications **

I, [identify the certifying individual], certify that:

1. I have reviewed this [specify report] of [identify small business issuer];

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact nec-

essary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the small business issuer as of, and for, the periods presented in this report;

4. The small business issuer's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the small business issuer and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the small business issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

(c) Evaluated the effectiveness of the small business issuer's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(d) Disclosed in this report any change in the small business issuer's internal control over financial reporting that occurred during the small business issuer's most recent fiscal quarter (the small business issuer's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the small business issuer's internal control over financial reporting; and

5. The small business issuer's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the small business issuer's auditors and the audit committee of the small business issuer's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting

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which are reasonably likely to adversely affect the small business issuer's ability to record, process, summarize and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the small business issuer's internal control over financial reporting.

Date:

[Signature]
[Title]

* Provide a separate certification for each principal executive officer and principal financial officer of the small business issuer. See Rules 13a-14(a) and 15d-14(a)

(32) *Section 1350 Certifications.*

(i) The certifications required by Rule 13a-14(b) (17 CFR 240.13a-14(b)) or Rule 15d-14(b) (17 CFR 240.15d-14(b)) and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. 1350).

(ii) A certification furnished pursuant to this Item will not be deemed "filed" for purposes of section 18 of the Exchange Act (15 U.S.C. 78r), or otherwise subject to the liability of that section. Such certification will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the small business issuer specifically incorporates it by reference.

(33)-(98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits if listed and described in the exhibit index.

(ii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by "other methods" than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10-QSB or the Form 10-KSB, as appropriate, covering the period in which the earnings statement was released.

[57 FR 36449, Aug. 13, 1992, as amended at 57 FR 48150, Oct. 21, 1992; 58 FR 14660, Mar. 18, 1993; 58 FR 21349, Apr. 21, 1993; 58 FR 26383, May 3, 1993; 58 FR 27469, May 10, 1993; 59 FR 36260, July 15, 1994; 59 FR 67759, Dec. 30, 1994; 60 FR 26614, May 17, 1995; 61 FR 24654, May 15, 1996; 61 FR 30401, June 14, 1996; 62 FR 36455, July 8, 1997; 65 FR 24799, Apr. 27, 2000; 67 FR 246, Jan. 2, 2002; 68 FR 36661, June 18, 2003]

EFFECTIVE DATE NOTE: At 69 FR 15613, Mar. 25, 2004, § 228.601 was amended by revising the exhibit table and paragraphs (b)(3), (b)(7), and (b)(17), effective Aug. 23, 2004. For the convenience of the user, the revised text is set forth as follows:

§ 228.601 (Item 601) Exhibits.

(a) * * *

EXHIBIT TABLE ITEM 601 OF REGULATION S-B									
	Securities Act Forms					Exchange Act Forms			
	SB-2	S-2	S-3	S-4 ³	S-8	10-SB	8-K ⁵	10-QSB	10-KSB
(1) Underwriting agreement	X	X	X	X			X		
(2) Plan of purchase, sale, reorganization, arrangement, liquidation or succession	X	X	X	X		X	X	X	X
(3) (i) Articles of Incorporation	X			X		X	X	X	X
(ii) Bylaws	X			X		X	X	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X
(5) Opinion on legality	X	X	X	X	X				
(6) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Correspondence from an independent accountant regarding non-reliance upon a previously issued audit report or completed interim review							X		
(8) Opinion on tax matters	X	X	X	X					
(9) Voting trust agreement and amendments	X			X		X			X
(10) Material contracts	X	X		X		X		X	X
(11) Statement re: computation of per share earnings	X	X		X		X		X	X
(12) No exhibit required	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(13) Annual report to security holders for the last fiscal year, Form 10-Q or 10-QSB or quarterly report to security holders ¹	X	X		X					X
(14) Code of ethics							X		X
(15) Letter on unaudited interim financial information	X	X	X	X	X			X	
(16) Letter on change in certifying accountant ⁴	X	X		X		X	X		X
(17) Letter on departure of director							X		
(18) Letter on change in accounting principles								X	X
(19) Reports furnished to security holders								X	
(20) Other documents or statements to security holders or any document incorporated by reference								X	X
(21) Subsidiaries of the small business issuer	X			X		X			X
(22) Published report regarding matters submitted to vote of security holders								X	X
(23) Consents of experts and counsel	X	X	X	X	X		X ²	X ²	X ²
(24) Power of attorney	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X					
(26) Invitations for competitive bids		X	X	X	X				
(27) through (30) [Reserved]									
(31) Rule 13a-14(a)/15d-14(a) Certifications								X	X
(32) Section 1350 Certifications								X	X
(33) through (98)[Reserved]									
(99) Additional exhibits	X	X	X	X	X	X	X	X	X

¹ Only if incorporated by reference into a prospectus and delivered to holders along with the prospectus as permitted by the registration statement; or in the case of a Form 10-KSB, where the annual report is incorporated by reference into the text of the Form 10-KSB.

² Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

³ An issuer need not provide an exhibit if: (1) an election was made under Form S-4 to provide S-2 or S-3 disclosure; and (2) the form selected (S-2 or S-3) would not require the company to provide the exhibit.

⁴ If required under Item 304 of Regulation S-B.

⁵ A Form 8-K exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

(b) * * *

(3) *Articles of incorporation and bylaws.* (i) A complete copy of the articles of incorporation. Whenever the small business issuer

files an amendment to its articles of incorporation, it must file a complete copy of the articles as amended. However, if such amendment is being reported on Form 8-K (§ 249.308

of this chapter), the small business issuer is required to file only the text of the amendment as a Form 8-K exhibit. In such case, a complete copy of the articles of incorporation as amended must be filed as an exhibit to the next Securities Act registration statement or periodic report filed by the small business issuer to which this exhibit requirement applies.

(ii) A complete copy of the bylaws. Whenever the small business issuer files an amendment to its bylaws, it must file a complete copy of the bylaws as amended. However, if such amendment is being reported on Form 8-K (§249.308 of this chapter), the small business issuer is required to file only the text of the amendment as a Form 8-K exhibit. In such cases, a complete copy of the bylaws as amended must be filed as an exhibit to the next Securities Act registration statement or periodic report filed by the small business issuer to which this exhibit requirement applies.

* * * * *

(7) *Correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review.* Any written notice from the small business issuer's current or previously engaged independent accountant that the independent accountant is withdrawing a previously issued audit report or that a previously issued audit report or completed interim review, covering one or more years or interim periods for which the small business issuer is required to provide financial statements under this Regulation S-B, should no longer be relied upon. In addition, any letter, pursuant to Item 4.02(c) of Form 8-K (§249.308 of this chapter), from the independent accountant to the Commission stating whether the independent accountant agrees with the statements made by the small business issuer describing the events giving rise to the notice.

* * * * *

(17) *Correspondence on departure of director.* Any written correspondence from a former director concerning the circumstances surrounding the former director's retirement, resignation, refusal to stand for re-election or removal, including any letter from the former director to the small business issuer stating whether the former director agrees with statements made by the small business issuer describing the former director's departure.

* * * * *

§ 228.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Give the following information for all securities that the small business issuer sold within the past three years without registering the securities under the Securities Act.

(a) The date, title and amount of securities sold.

(b) Give the names of the principal underwriters, if any. If the small business issuer did not publicly offer any securities, identify the persons or class of persons to whom the small business issuer sold the securities.

(c) For securities sold for cash, the total offering price and the total underwriting discounts or commissions. For securities sold other than for cash, describe the transaction and the type and amount of consideration received by the small business issuer.

(d) The section of the Securities Act or the rule of the Commission under which the small business issuer claimed exemption from registration and the facts relied upon to make the exemption available.

(e) If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-QSB, Form 10-Q, Form 10-KSB or Form 10-K (§§249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

(f) As required by §230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)) after effectiveness of its Securities Act registration statement, and thereafter on each of its subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act through the later of disclosure of the application of all the offering proceeds, or disclosure of the termination of the offering. If a report of the use of proceeds is required

with respect to the first effective registration statement of the predecessor issuer, the successor issuer shall provide such a report. The information provided pursuant to paragraphs (f)(2) through (f)(4) of this Item need only be provided with respect to the first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act after effectiveness of the registration statement filed under the Securities Act. Subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act need only provide the information required in paragraphs (f)(2) through (f)(4) of this Item if any of such required information has changed since the last periodic report filed. In disclosing the use of proceeds in the first periodic report filed pursuant to the Exchange Act, the issuer or successor issuer should include the following information:

(1) The effective date of the Securities Act registration statement for which the use of proceeds information is being disclosed and the Commission file number assigned to the registration statement;

(2) If the offering has commenced, the offering date, and if the offering has not commenced, an explanation why it has not;

(3) If the offering terminated before any securities were sold, an explanation for such termination; and

(4) If the offering did not terminate before any securities were sold, disclose:

(i) Whether the offering has terminated and, if so, whether it terminated before the sale of all securities registered;

(ii) The name(s) of the managing underwriter(s), if any;

(iii) The title of each class of securities registered and, where a class of convertible securities is being registered, the title of any class of securities into which such securities may be converted;

(iv) For each class of securities (other than a class of securities into which a class of convertible securities registered may be converted without additional payment to the issuer) the following information, provided for both the account of the issuer and the account(s) of any selling security hold-

er(s): the amount registered, the aggregate price of the offering amount registered, the amount sold and the aggregate offering price of the amount sold to date;

(v) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of expenses incurred for the issuer's account in connection with the issuance and distribution of the securities registered for underwriting discounts and commissions, finders' fees, expenses paid to or for underwriters, other expenses and total expenses. Indicate if a reasonable estimate for the amount of expenses incurred is provided instead of the actual amount of expenses. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

(B) Direct or indirect payments to others;

(vi) The net offering proceeds to the issuer after deducting the total expenses described in paragraph (f)(4)(v) of this Item;

(vii) From the effective date of the Securities Act registration statement to the ending date of the reporting period, the amount of net offering proceeds to the issuer used for construction of plant, building and facilities; purchase and installation of machinery and equipment; purchases of real estate; acquisition of other business(es); repayment of indebtedness; working capital; temporary investments (which should be specified); and any other purposes for which at least five (5) percent of the issuer's total offering proceeds or \$100,000 (whichever is less) has been used (which should be specified). Indicate if a reasonable estimate for the amount of net offering proceeds applied is provided instead of the actual amount of net offering proceeds used. Indicate whether such payments were:

(A) Direct or indirect payments to directors, officers, general partners of the issuer or their associates; to persons owning ten (10) percent or more of any class of equity securities of the issuer; and to affiliates of the issuer; or

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(B) Direct or indirect payments to others; and

(viii) If the use of proceeds in paragraph (f)(4)(vii) of this Item represents a material change in the use of proceeds described in the prospectus, the issuer should describe briefly the material change.

[57 FR 36449, Aug. 13, 1992, as amended at 61 FR 54508, Oct. 18, 1996; 62 FR 39761, July 24, 1997]

§ 228.702 (Item 702) Indemnification of Directors and Officers.

State whether any statute, charter provisions, by-laws, contract or other arrangements that insures or indemnifies a controlling person, director or

officer of the small business issuer affects his or her liability in that capacity.

§ 228.703 Purchases of equity securities by the small business issuer and affiliated purchasers.

(a) In the following tabular format, provide the information specified in paragraph (b) of this Item with respect to any purchase made by or on behalf of the small business issuer or any "affiliated purchaser," as defined in § 240.10b-18(a)(3) of this chapter, of shares or other units of any class of the small business issuer's equity securities that is registered by the small business issuer pursuant to section 12 of the Exchange Act (15 U.S.C. 78l).

SMALL BUSINESS ISSUER PURCHASES OF EQUITY SECURITIES

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share (or unit)	(c) Total number of shares (or units) pur- chased as part of publicly announced plans or programs	(d) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #1 (identify be- ginning and ending dates).				
Month #2 (identify be- ginning and ending dates).				
Month #3 (identify be- ginning and ending dates).				
Total.				

(b) The table shall include the following information for each class or series of securities for each month included in the period covered by the report:

(1) The total number of shares (or units) purchased (column (a));

Instruction to Paragraph (b)(1) of Item 703: Include in this column all small business issuer repurchases, including those made pursuant to publicly announced plans or programs and those not made pursuant to publicly announced plans or programs. Briefly disclose, by footnote to the table, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company's obligations upon exercise of out-

standing put options issued by the company, or other transactions).

(2) The average price paid per share (or unit) (column (b));

(3) The total number of shares (or units) purchased as part of publicly announced repurchase plans or programs (column (c)); and

(4) The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs (column (d)).

Instructions to Paragraphs (b)(3) and (b)(4) of Item 703: 1. In the table, disclose this information in the aggregate for all plans or programs publicly announced.

2. By footnote to the table, indicate:

a. The date each plan or program was announced;

b. The dollar amount (or share or unit amount) approved;

c. The expiration date (if any) of each plan or program;

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- d. Each plan or program that has expired during the period covered by the table; and
- e. Each plan or program the small business issuer has determined to terminate prior to expiration, or under which the small business issuer does not intend to make further purchases.

Instruction to Item 703:

Disclose all purchases covered by this Item, including purchases that do not satisfy the conditions of the safe harbor of §240.10b-18 of this chapter.

[68 FR 64968, Nov. 17, 2003]

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

Subpart 229.1—General

Sec.

229.10 (Item 10) General.

Subpart 229.100—Business

- 229.101 (Item 101) Description of business.
- 229.102 (Item 102) Description of property.
- 229.103 (Item 103) Legal proceedings.

Subpart 229.200—Securities of the Registrant

- 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.
- 229.202 (Item 202) Description of registrant's securities.

Subpart 229.300—Financial Information

- 229.301 (Item 301) Selected financial data.
- 229.302 (Item 302) Supplementary financial information.
- 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.
- 229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.
- 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.
- 229.306 (Item 306) Audit committee report.
- 229.307 (Item 307) Disclosure controls and procedures.
- 229.308 (Item 308) Internal control over financial reporting.

Subpart 229.400—Management and Certain Security Holders

- 229.401 (Item 401) Directors, executive officers, promoters and control persons.
- 229.402 (Item 402) Executive compensation.
- 229.403 (Item 403) Security ownership of certain beneficial owners and management.
- 229.404 (Item 404) Certain relationships and related transactions.
- 229.405 (Item 405) Compliance with section 16(a) of the Exchange Act.
- 229.406 (Item 406) Code of ethics.

Subpart 229.500—Registration Statement and Prospectus Provisions

- 229.501 (Item 501) Forepart of registration statement and outside front cover page of prospectus.
- 229.502 (Item 502) Inside front and outside back cover pages of prospectus.
- 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.
- 229.504 (Item 504) Use of proceeds.
- 229.505 (Item 505) Determination of offering price.
- 229.506 (Item 506) Dilution.
- 229.507 (Item 507) Selling security holders.
- 229.508 (Item 508) Plan of distribution.
- 229.509 (Item 509) Interests of named experts and counsel.
- 229.510 (Item 510) Disclosure of Commission position on indemnification for Securities Act liabilities.
- 229.511 (Item 511) Other expenses of issuance and distribution.
- 229.512 (Item 512) Undertakings.

Subpart 229.600—Exhibits

- 229.601 (Item 601) Exhibits.

Subpart 229.700—Miscellaneous

- 229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.
- 229.702 (Item 702) Indemnification of directors and officers.
- 229.703 Purchases of equity securities by the issuer and affiliated purchasers.

Subpart 229.800—List of Industry Guides

- 229.801 Securities Act industry guides.
- 229.802 Exchange Act industry guides.

Subpart 229.900—Roll-Up Transactions

- 229.901 (Item 901) Definitions.
- 229.902 (Item 902) Individual partnership supplements.
- 229.903 (Item 903) Summary.
- 229.904 (Item 904) Risk factors and other considerations.
- 229.905 (Item 905) Comparative information.